APPENDIX

In the Supreme Court of the United States

TERM, 1971

No. 71-5313

DONALD L. BROOKS, *Petitioner,*

v.

TENNESSEE, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

PETITION FOR CERTIORARI FILED AUGUST 25, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

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IN THE CRIMINAL COURT FOR HAMILTON COUNTY,
SIXTH JUDICIAL CIRCUIT OF TENNESSEE
DIVISION NUMBER ONE

STATE OF TENNESSEE
vs.
DONALD L. BROOKS
} Nos. 118061 & 118079

Excerpts of transcript of testimony—April 1, 1970

PAGES 89, LINE 8 THROUGH PAGE 92, LINE 19 OF TRIAL TRANSCRIPT SHOWING HOW APPELLANT RAISED THE CONSTITUTIONAL QUESTION PRESENTED IN THIS APPEAL IN THE TRIAL COURT.

THE COURT: All right. Who's your next witness?

MR. POOLE: That's the State's case, sir.

THE COURT: All right, the State's case,

MR. POOLE: The State did intend to go into that, but I think that was all gone into by the defense.

THE COURT: All right. Do you need a few minutes before we, what is your situation on defense witness, or testimony, or what not? While the jury is out, it's a good time for a recess, unless you have other motions.

MR. SUMMERS: Your Honor, I feel like I need to call Chief Cornish, if they're not going to call him.

THE COURT: Well, you certainly have that right.

MR. SUMMERS: Could I do this, your Honor, if I call him, I'd like to ask the Court to allow me greater leniency and to cross examine him. He is a State's witness; he's under their subpoena, and I'd like to be able to cross examine him.

THE COURT: He'll be your witness if you call him, at this point, since he hasn't testified, so you think about that. And are you going to use, is Brooks going to testify or not?

MR. SUMMERS: Your Honor, I'd like to make a motion, merely for the record.

THE COURT: All right, make your motions now, and then we'll see what, you can answer those other questions then.

MR. SUMMERS: Your Honor, of course, this is merely for the record. I know what the law is, but it's something that

I'd like to preserve for the record. At this time, of course, you realize we have a statute in Tennessee, which states that this defendant has to testify first.

THE COURT: That's right.

MR. SUMMERS: I would like, for the purpose of the record, to object to my client, at this time, I really do not feel that I know if I want to put him on or not, and I would like, I have another witness, two more witnesses, I'll use Chief Cornish to put on the stand, and I would like to reserve the right to call Mr. Brooks after they have testified, if the facts should warrant it. And that's my motion I'd like to——

THE COURT: (Interposing) Well——

MR. POOLE: (Interposing) Sir, we'll waive the statute if you would waive the statute.

THE COURT: No, sir, I'm going to follow the law, and the law is, as you know it to be, that if a defendant testifies he has to testify first. And so, during the recess you can consider that. Do you have anything else to bring before the Court before we recess?

MR. SUMMERS: Your Honor, for the record merely, I'd like to move for a directed verdict, merely for the record, based on, as I, for the record, based on, of course, your Honor's overruled me on a motion to suppress, and this motion may be unnecessary, but I would, based on our contention that the confession and the identification are illegal. We submit there is no competent evidence before the Court. If the identification is knocked out, the confession, stands by itself. And further, along those lines, we submit that the confession itself is illegal; therefore, the identification would be fruits of a poisonous tree. And, therefore, we move for a directed verdict, based on no competent evidence, merely for the record.

THE COURT: Well, you have certainly gone into great detail in these matters, and my ruling, I don't see any reason to change my ruling, which has already been given. So, I merely, again, overrule your motion. So, we'll have a short recess so you can determine how you want to proceed.

(Thereupon a short recess was had)

THE COURT: Mr. Summers, you do want this witness to testify and that you're not going to use the defendant, is that right?

MR. SUMMERS: Not at this time, your Honor. I will——

THE COURT: (Interposing) Well, I've ruled on your motion on that. So, in other words if you intend to let the defendant Brooks testify, he'll have to be first.

MR. SUMMERS: Your Honor, of course, I understand the Court's ruling on this. I would like, for the purpose of the record, like I explained, I would like to later move to put him on again if I should decide. I'll do it out of the presence of the jury though.

THE COURT: Well, no, I've already ruled on that, but I'm just again reminding you, in case you have thought about it again. If you're going to use him, if he wants to testify on his own behalf, he'll have to do it now.

MR. SUMMERS: All right, your Honor. We respectfully note an exception.

STATE OF TENNESSEE	No. 118061, 118079
-VS-	In the Criminal Court of Hamilton County, Tennessee
DONALD BROOKS	Division I

MOTION FOR NEW TRIAL

[Filed April 7, 1970]

Comes the defendant and moves the Court reverse the verdict of the Petit Jury in the aforestyled cause and to grant him a new trial on the following grounds:

1. The evidence preponderates against the verdict.
2. The Honorable Court erred in refusing to grant defendant's motion to suppress evidence based on an alleged coerced confession by the defendant which was given to the Detectives of the Chattanooga Police Department.
3. The Honorable Court erred in refusing to sustain defendant's motion to suppress evidence based on the alleged suggestiveness of the line-up in which he was placed and identified by the prosecuting witnesses.
4. The Honorable Court erred in refusing to grant a mistrial based on Assistant Chief James M. Davis' reference to another case in which defendant was charged.
5. The Honorable Court erred in failing to grant a mistrial when Chief Robert Cornish referred to photographs of the defendant shown to the victim as mug shots.
6. The Honorable Court erred in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness to testify is unconstitutional.
7. The Honorable Court erred in refusing defendant's request to declare Hamilton County Chief of Detectives Robert Cornish a hostile witness and allow defendant to cross examine him as he was subpoenaed by the State and not called as a witness.
8. The Honorable Court erred in instructing the jury on what constitutes the indeterminate sentence law in the State of Tennessee and by overruling defendant's special request to strike said instruction from the charge.

9. The Honorable Court erred in failing to give to the jury defendant's special request on requesting identification beyond a reasonable doubt.

/s/ Jerry H. Summers 4-7-70
JERRY H. SUMMERS
Attorney for Defendant

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APPEAL IN ERROR FROM THE CRIMINAL COURT OF HAMILTON COUNTY—HONORABLE CAMPBELL CARDEN, JUDGE

DONALD L. BROOKS,
Plaintiff-in-Error
vs.
STATE OF TENNESSEE
Defendant-in-Error

No. 205
(Robbery by the use of a deadly weapon).

For Plaintiff-in-Error:

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For Defendant in Error

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Nashville, Tennessee
EDWARD E. DAVIS
District Attorney General
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DONNIE WAYNE POOLE
Ass't. Attorney General
Chattanooga, Tennessee

JUDGMENT AFFIRMED:
JOHN A. MITCHELL, *Judge*
Opinion Filed: May 5, 1971

OPINION

Donald L. Brooks, who will be referred to as the defendant or by name has appealed his conviction of robbery by the use of a deadly weapon and a sentence of ten (10) years in the penitentiary, and carrying a pistol and a fine of $50.00 and eleven months and twenty-nine days in the workhouse from the Criminal Court of Hamilton County, Tennessee, Honorable Campbell Carden Judge presiding.

The Grand Jury in Hamilton County returned two indictments against Donald L. Brooks on December 3, 1969. In number 118061 the indictment charged robbery of W. R.

Doremus of $11,327.00 belonging to Red Food Stores, by use of a deadly weapon, to-wit: a pistol on October 30, 1969 and in number 118079 the indictment charged unlawfully carrying a pistol on the same date.

On December 15, 1969 the trial court adjudged the defendant indigent and appointed Honorable Jerry H. Summers, Attorney at Law to represent him.

The defendant was tried on the two indictments on April 1, 1970, the trial jury found the defendant guilty of armed robbery and imposed a sentence of ten (10) years in the penitentiary, and found him guilty of carrying a pistol and fixed the punishment at a fine of $50.00 and a sentence of eleven months and twenty-nine days in the workhouse, upon which the trial judge pronounced judgment.

His motion for a new trial being heard and overruled the defendant appealed and assigned the following errors:

1. The defendant's confession should not have been permitted into evidence because it was coerced and improperly obtained by the police officers.

2. The Trial Court was in error in refusing to sustain defendant's Motion to Suppress Evidence based on the invalid identification and suggestiveness of the lineup in which he was placed and identified by prosecuting witness Doremus.

3. The defendant should not have been denied the privilege of testifying because he did not choose to testify as the first witness in his own behalf.

4. The trial judge should have given the jury a special request to the effect that they should be satisfied beyond a reasonable doubt as to the identity of the defendant, and

5. The evidence preponderates against the verdict and in favor of the innocence of the accused.

A brief review of the facts is necessary to properly evaluate the assignments of error.

On October 30, 1969 about 7:00 p.m. William R. Doremus, manager of Red Food Stores, a corporation, was robbed of about $11,327.00 in the place of business of his employer. He was at the safe apparently making arrangements for putting the money away for the day when a man armed with a pistol drawn, approached him and demanded the money. This "stunned" Mr. Doremus. The robber "grabbed" part of the money and Mr. Doremus handed him part of it. Mr.

Doremus testified he was in fear, that he did not know what to do. The robber took the money and went out the door. Mr. Doremus gave the officers a description of the man that robbed him. Three weeks later the officers told him they had a man under arrest who confessed he committed the robbery. Mr. Doremus went down to the Hamilton County Jail and picked the defendant out of a lineup of five or six individuals. They had told Mr. Doremus that the man was in the line-up.

At the trial Mr. Doremus pointed out the defendant in the courtroom and said he was sure he was the man who robbed him. He said the defendant was in the store from a minute to two minutes during the robbery. He testified there were 25 or 30 people in the store. About an hour after the robbery he was shown some pictures but was unable to identify the defendant from the pictures. He said at that time he was excited, nervous or something. The victim said the officer told him he had the boy. Mr. Doremus testified that the robber was about a foot from him during the robbery.

James M. Davis, Assistant Chief of Detectives of the Chattanooga Police Department testified he had known the defendant Donald L. Brooks all his life. That he talked to the defendant in the Narcotics Office of the City on November 14, 1969, about the armed robbery of the Red Food Store. That he warned the defendant of his rights and told him he wanted to talk to him, and the defendant signed a waiver of his rights which was made State's exhibit no. 1. The witness then read the warning and the waiver of his rights to the court and jury, in which the defendant's rights were explained to him under the Miranda rule and the defendant said he understood the warning, that he did not want a lawyer at that time and was willing to make a statement.

The defendant made a detailed confession which was reduced to writing and signed by the defendant and by detective J. M. Davis, as a Notary Public and detective H. R. Outlaw. In confession the defendant said he got out of the car about a half block from the Red Food Store, went into the store, saw a man with a safe door open and money on top of the safe. That he drew a derringer pistol from his pocket and told the man to hand him the money, when the victim failed to do so he grabbed the money and ran out the front door and to the rear of the building where he hid. Then

later walked home, called a cab and went to the Read House where he counted the money and spent the night. That he counted to $10,000.00 and quit, that he did not know how much more there was. The next morning he took a plane to New Orleans where he stayed about 10 days and spent the money. On November 8, 1969 he caught a plane back to Chattanooga.

Chief Davis testified there was no questioning of the defendant when he was first arrested. That five minutes after he got there he told them all about it, even in the car before they got there. That the defendant could have called an attorney if he wanted one, he used the phone.

John David Gilstrap introduced on behalf of the defendant testified he was 23 years old. That he was 5'11" and weighed 178 pounds and he was in the Hamilton County Jail under a conviction of armed robbery and a sentence of fifteen years, pending an appeal. That he had been convicted of burglary in 1965. That he was a participant in a line-up involving the Red Food Store robbery in which line-up Donald Brooks was also included. That there were six people in the line-up, that they were Jesse Quinn, David Petty, Billy Easterly, William C. Beattie, Donald Brooks and himself. That he was wearing penitentiary clothes. He had come back from Brushy Mountain. A man and woman viewed the line-up, the woman picked Jessie Quinn and the man picked Donald Brooks. They were all taller than Petty and Brooks.

Robert E. Cornish, Chief Detective of Hamilton County Sheriff's Office introduced on behalf of the defendant, testified he participated in the investigation on October 30, of a hold up at Red Food Store and testified in the preliminary hearing, and before the Grand Jury for the State, and subpoenaed for the State in this case but had not testified for the State. That he conducted the lineup in which Mr. Brooks was allegedly identified by Mr. Doremus, that so far as he knew Brooks had not been convicted of any criminal offense. It was stipulated the defendant had no prior convictions.

That Mr. Doremus gave him a description of the person supposed to have held up the Red Food Store. The description was that he was a white male that needed a shave badly, approximately 5'6" to 5'8" tall, wearing a dark jacket, about 20 years old, carried a small pistol. That night he conducted a line-up which did not include Mr. Brooks. Mr. Doremus,

his wife and a teller by the name of Carolyn Correll viewed the line-up. No one picked any of them out. Mr. Doremus was shown a mug-book which did not include Mr. Brook's picture, he did not pick anybody out of it. That he understood Mr. Doremus was shown some pictures which included Mr. Brook's picture and that he was evidently not able to pick Mr. Brook's picture out.

That after Chief Davis told him he had gotten a statement from Brooks, he then put Brooks in a line-up. That he did not know what information was given Mr. Doremus when he was told to come down. Doremus did view a line-up. In the line-up was no. 1 John Gilstrap, age 22, white male 5'11", 180 pounds, no. 2 was Jesse Fay Quinn, age 24, white male 6', 178 pounds, no. 3 was Donald L. Brooks, 19 white male 5'10" no. 4 David L. Petty, age 21, white male 5'10" 150 pounds, no. 5 Billy Ray Easterly, 25 white male, 6'1", 193 pounds, no. 6 William C. Beattie 22, white male, 6' 165 pounds. They were prisoners from the Hamilton County Jail selected as near as possible to Brooks height, weight and age.

Mr. Doremus' wife viewed the line-up but did not pick out anyone.

On cross-examination Chief Cornish testified he advised the defendant Brooks of his rights, prior to the line-up, and he signed a waiver and identified the same instrument which had been shown to the court and jury. Defendant's counsel stipulated it had already been read and shown to the jury. The defendant did not at any time request an attorney or anything. That these were the pictures of the line-up which he made, and were received in evidence and marked State's exhibit 4, 5, and 6. That Mr. Doremus identified Donald Brooks as the person who had robbed him.

On the question of the admissibility of the defendant's confession which is the basis of the first assignment of error the trial judge conducted a hearing out of the presence of the jury in which the defendant testified he was on narcotics. That at the time he gave his statement to the police he was under arrest on charges growing out of the kidnapping of the Olan Mills family. That prior to being arrested by the police on that particular case he had been using narcotics. That he had used narcotics about two years but in the form of shooting them in a syringe into his arm about one year. That the last fix he had before being arrested in the Olan

Mills case was about 5:00 or 5:30 that morning. That he was shooting Demerol. That he was in Mr. Mills car shooting narcotics. That he had a 30 cc bottle of liquid. He guessed he would average a shot in the veins of the arms every 20 or 30 minutes.

That subsequent to that he was arrested by the police and gave a statement to Chief Davis. That he did not have any shot before he gave the statement about the kidnapping. That Mr. Thomas gave him a bologna sandwich, he couldn't eat it because he could not hold anything on his stomach. He was having a pretty bad time. He was sick. Sometime that evening he started suffering from the lack of narcotics, it was right before dark. He had already given a statement in the kidnapping case.

That he spent the night in the City Jail, and did not get any sleep. He was sick and above that it was real hot in there, and then he knew two or three of the policemen there at the City Jail and they came back and kept wanting to know about this and that all through the night. The next morning he said he was really feeling bad.

Pete Davis told him the night before that he'd come over and see how he was the next morning. That they had talked about him being on narcotics and everything. And the next morning Chief Davis came and took him over. The defendant said he was in pretty bad shape and needed something cold to drink. Chief Davis bought the defendant two or three cokes but still it did not help him much. He told the defendant they had him for kidnapping, and he knew the defendant had been in different things and the defendant should go on and confess and tell about them, that they couldn't hurt him.

The defendant did not remember whether they had advised him of his rights before he made the statement about the kidnapping.

When the defendant was asked by his counsel if he remembered giving the statement to Detective Davis, he answered, "I know that I gave a statement. I don't know exactly what's, I can't remember what's there." He did not recall whether he was advised of his rights under the Miranda rule.

On cross-examination the defendant said he couldn't say he remembered signing two papers. When asked if he gave Chief Davis a statement about the robbery at Red Food

Store he answered, "I suppose I did he's got it down." He testified the officers did not threaten him or promise him anything. "He just promised me he'd try to get me something to eat, and make me, help me feel better."

Defendant's counsel asked the defendant if he considered himself an addict and he answered "Yes sir."

Chief Davis testified it was about 10:45 a.m. November 15 when the defendant started the statement that he first started talked to him about 10:30 a.m. The following is a statement signed by the defendant.

"Your Constitutional Rights

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk to a lawyer.

Waiver of Rights

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure, force or coercion of any kind has been used against me."

/s/ Donald L. Brooks

Chief Davis testified that he had known the defendant all his life. That it was his understanding the defendant started on glue, that he said on the night of the kidnapping that he did take a shot of something and that when he was in New Orleans he was shooting morphine or heroin. When asked what the defendant's condition was when the Chief

talked to him Davis said, "Just like it is now, as far as I was concerned." That he had been in custody approximately 24 hours. That the defendant said he was suffering symptoms of withdrawal but Chief Davis could not say whether he was or not, that he did not seem particularly nervous or anything like that, at that time. That he gave a statement about the kidnapping on the day before. Chief Davis said, "He didn't appear to me to be going through any withdrawals. Of course he may have been on narcotics but he didn't appear to be going through any withdrawals." "My understanding, it's like tearing your limb off, or your arm, going through withdrawal and you hit your head against the wall and everything else. He was not in that condition."

Chief Davis testified they weren't "really questioning him. I was sitting there talking to Donnie like I would my own kid." Detective Outlaw witnessed the statement and the signing of the waiver.

Chief Davis said he did not recall the defendant complaining of being sick. That they let him use the telephone. Davis bought the defendant a coca cola. He did not have an attorney. He could have had an attorney, he didn't have to talk to them if he didn't want to, he knew that. He did not say he was too sick to know what he was doing. He could have called an attorney if he had wanted to, he used the phone. Defendant's counsel asked Chief Davis if he felt like this 19 years old boy with eleventh grade education fully understood this rights waiver that they had him sign and Chief Davis answered, "I think he did, yes sir."

After hearing evidence and argument of counsel on the admissibility of the confession, the trial judge overruled the defendant's objection or motion to suppress this evidence and held that the waiver and confession were competent and admissible.

The findings of the trial court upon questions of fact are conclusive and will not be set aside unless this court finds the evidence preponderates against the judgment of the trial judge. *Lawrence* v. *Henderson,* 433 S.W.2d 96; *State ex rel Hall* v. *Meadows,* 215 Tenn. 668, 389 S.W.2d 256; *Taylor* v. *State,* 180 Tenn. 62, 389 S.W.2d 256.

We hold that the trial judge was correct in his ruling and that the evidence does not preponderate against his finding.

In support of his second assignment of error and his

attack on the validity of the line-up the defendant has cited *Foster* v. *California,* 89 S.Ct. 1127 (1969) and quotes from it that "the police repeatedly said to the witness, 'This is the man'." No promptings or suggestions like that are shown in the case at bar. When Chief Cornish called the victim Mr. Doremus he told him they wanted him down to view the line-up that they had the man that held up the store. Mr. Doremus knew before he viewed the line-up that Brooks the defendant would be one of the six in it.

We think it is reasonable to conclude that a victim called to view a line up in an investigation of a robbery would naturally expect the suspect to be one of those in the line-up. In *Herman* v. *State,* 453 S.W.2d 421, relied on by the defendant, the witness was unable to identify the defendant in the line-up until after his wife had identified the defendant in the presence of the witness, in an office in the police station.

In the Herman case, the line-up question could not be considered because timely objection had not been made in the trial. Here the victim Doremus and his wife viewed the line-up separately, and Doremus identified the defendant Brooks and the wife of Doremus could not identify Brooks, but picked out another one in the line-up, but it was shown Mrs. Doremus at the time of the robbery was 30 feet away in a car in the parking lot, and did not have a good view of the robber.

The defendant Brooks contends in his motion for a new trial and in his assignment of error that the identification of the defendant by the victim Mr. Doremus was influenced by suggestive and prejudicial conduct of Detective Chief Cornish and that the line-up procedure was highly suggestive and tended to point toward the defendant.

About an hour after the robbery on the same night the victim, Mr. Doremus was shown some pictures which they said included Brooks and at that time Mr. Doremus was unable to pick him out. He was also shown other pictures which did not include Brooks and a line-up which did not include Brooks. He did not pick anyone out in any of them. The victim said at that time he was still nervous and wanted to make sure.

It is well to remember there is no evidence that the victim ever identified any other person as the robber. It is

true he was shown a group of pictures which they said included Brooks and he was unable to identify the picture, but this was about an hour after the robbery when the victim was still nervous from the harrowing ordeal he had experienced.

Mr. Doremus had a good opportunity to observe the criminal act when the defendant stood within two feet of him with a pistol drawn demanding the money, snatched up part of the money and Mr. Doremus gave him part of it, and saw the defendant make his getaway out the front door of the store. Although the victim was not specifically asked on what he based the identification, we think it is clear that he could have said it was upon his observation of the defendant during the criminal act, in fact that is all he had to go on.

The defendant also relies on *Greer* v. *State*, 443 S.W.2d 681 where the judgment was reversed because one of the defendants was not represented by counsel at the line-up. In the case at bar, the defendant Brooks waived the presence of counsel at the line-up. No question of the lack of counsel was made in the trial court or here.

While it is true, as held in the Wade and Gilbert cases, that the line-up is a critical stage of the criminal proceedings, its importance is lessened by the fact that in the case at bar the confession of guilt by the defendant was the real basis of the jury's verdict of guilty. We think the fact that the conviction is predicated upon evidence independent of the line-up identification, does not bring the case within the rule laid down in the Wade and Gilbert cases.

We find no evidence of any effort on the part of Detective Cornish, or on the part of any other person, to influence Mr. Doremus the victim, in making his identification of the defendant Brooks.

We are of the opinion the line-up was fair and that no rights of the defendant were violated.

Assignment number 2 is overruled.

Responding to assignment 3, which complains that the court committed error in ruling that if the defendant desired to testify he must do so before any other testimony for the defense is heard by the court trying the case.

The ruling of the court is supported by T.C.A. 40-2403, *Rayland* v. *State*, 86 Tenn. 472 and *Clemons* v. *State*, 92

Tenn. 282. This is the law in Tennessee now and it is our duty to follow it until our Supreme Court holds to the contrary. The assignment is overruled.

The defendant's fourth assignment of error, is that the trial judge should have given the defendant's special request that

> "If you have a reasonable doubt upon all the proof, as to whether the defendant has been identified as the person who was present and committing the offense, it will be your duty to acquit him."

The trial judge gave a full and clear charge to the jury which taken as a whole was adequate and sufficient. Upon the particular part of the charge mentioned in the defendant's special request the court said to the jury:

> "In any of these offenses you must, upon all the proof, be satisfied beyond a reasonable doubt of all the elements of the offense before you can convict the accused, * * * usually in a robbery case, the question of identity of the person or persons doing the robbery is an important matter for consideration by the jury. In reaching a conclusion as to whether the identity of the accused has been established to your satisfaction beyond a reasonable doubt, you will, in addition to the other rules given to you for judging the credibility of witnesses and the weight of the evidence, observe the following rules. You will look to all the circumstances and conditions under which the witness or witnesses claim to have seen the accused, whether day or night; whether the opportunities for observation were good or bad; whether the perceptions of the witness or witnesses seem to be quick and accurate or otherwise. You will also look into and take into consideration whether there are or are not any corroborating facts and circumstances related by other witnesses. The identity of the accused and the connection of the accused with the crime must be established to your satisfaction beyond a reasonable doubt."

The assignment is overruled.

The fifth assignment of error challenges the sufficiency of the evidence, the defendant's insistence is that it preponderates against the verdict of the jury and in favor

of his innocence. In reviewing the evidence under these assignments, we are bound by the rule, that a jury's verdict of guilt, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in the evidence in favor of and establishes the State's theory of the case. Under such a verdict, the presumption of innocence which the law accords an accused prior to conviction, disappears and is replaced by a presumption of guilt which puts upon him the burden of showing upon appeal that the evidence preponderates against the verdict and in favor of his innocence. We may review the evidence only to determine whether it preponderates against the verdict and in doing so, we must take the verdict as having established the credibility of the State's witnesses. The verdict will be disturbed on the facts only if the evidence clearly preponderates against it and in favor of the innocence of the accused. *Leach* vs. *State*, 220 Tenn. 526, 420 S.W.2d 641 *Gulley* v. *State*, 219, 114, 407 S.W.2d. 186; *Jamison* v. *State*, 220 Tenn. 280, 416 S.W.2d 768; *Webster* v. *State*, —— Tenn. Crim. App. ——, 425 S.W.2d 799; *Brown* v. *State*, Tenn. Crim. App. —— 441 S.W.2d 485.

The evidence does not preponderate against the verdict.

The assignment is overruled.

We commend court appointed counsel for the able representation he has given the defendant in this case.

The judgment is affirmed.

/s/ JOHN A. MITCHELL, *Judge*

CONCUR:

/s/ WILLIAM S. RUSSELL, *Judge*

THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

DECEMBER, 1970

DONALD L. BROOKS,
Plaintiff in Error

vs.

STATE OF TENNESSEE
Defendant in Error

No. 205
Hamilton County

DISSENTING OPINION

It is settled law in this state, and under decisions of the Supreme Court of the United States, that a confession taken from a person suffering from the effects of narcotic or alcoholic withdrawal symptoms to such an extent that he is shorn of his volition is not admissible in evidence against him. See *Vandergriff* vs. *State*, 219 Tenn. 302, 409 S.W.2d 370; *Shannon* v. *State*, 221 Tenn. 412, 427 S.W.2d 26; *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745; and, of course, *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602. In this case the assistant Chief of Detectives, who had known the defendant all his life and was familiar with the history of his addiction to narcotics sufficiently corroborated the defendant's testimony that he had been deprived of drugs throughout a hot and sleepless night to such an extent that I am convinced the evidence preponderates against the finding of the trial judge that the confession taken by Chief Davis was a voluntary product of the free will of the defendant.

Although Chief Davis testified he did not recognize any of the symptoms of drug withdrawal at the time he took the confession, he said he knew it affected an addict like "tearing your limb off, or your arm . . ." I believe we must take judicial notice that if, as Chief Davis said, this defendant was a confirmed addict who had been locked away from medication over night, his physical and mental condition had to be in such a state of deterioration that he could not function normally and exercise that degree of choice necessary to effect a waiver of the rights that were

explained to him while in that condition. As our Supreme Court said in *Vandergriff, supra,* a case in which the defendant was under the influence of alcohol when he made the statement:

> "It cannot be doubted, on this record, that at the time of these inculpatory statements, the defendant had, in substantial part at least, been shorn of his volition. His statement could not have been 'the product of a free intellect.' "

I believe the record before us as fairly summarized by Judge Mitchell in the majority opinion pictures a person much less in control of his body and mind than was *Vandergriff*. If nothing else the widely discussed and troublesome "drug culture" of late so prevalent in our society has taught all of us that narcotics reduce a human being to less than a rational and intellectually guided person, and that the sudden isolation of a person addicted to a heavy daily dosage of drugs leaves him in a pitiful state in which he will resort to almost any course of action he feels will afford him relief.

Without belaboring the point, I believe the evidence establishes that the confession was induced by the defendant's reaction to prolonged drug usage and his sudden withdrawal from same, and I must respectfully dissent from the holding of the majority to the contrary.

/s/ CHARLES GALBREATH
Judge

COURT OF CRIMINAL APPEALS OF TENNESSEE,
AT KNOXVILLE

[Filed May 5, 1971]

DONALD L. BROOKS	No. 205, Hamilton County
vs. (No. 118061)	Offense: Armed Robbery
STATE OF TENNESSEE	AFFIRMED

JUDGMENT

Came the plaintiff in error, DONALD L. BROOKS, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Hamilton County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the plaintiff in error, for his offense of Armed Robbery be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Ten (10) years, and not less than Ten (10) years, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

It is further ordered by the Court that plaintiff in error be infamous and disqualified from holding any office under this State, or exercising the elective franchise.

The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Hamilton County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy

of this judgment to the Sheriff of Hamilton County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

JOHN A. MITCHELL
WILLIAM S. RUSSELL

FELONY—Affirmed (Infamous)

COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

DONALD L. BROOKS	No. 205, Hamilton County
-vs- (No. 118079)	Offense: Carrying a Pistol
STATE OF TENNESSEE	AFFIRMED

JUDGMENT

Come the plaintiff in error, Donald L. Brooks, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Hamilton County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by the court that the State of Tennessee recover of Donald L. Brooks the plaintiff in error, for the use of the County of Hamilton, the sum of $50.00, the fine assessed against ——— in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Hamilton County, subject to the lawful rules and regulations thereof for a term of Eleven Months & 29 days and that after the expiration of the aforesaid term of imprisonment he remain in the custody of the Sheriff of Hamilton County, until the said fine and costs are paid, secured or worked out in the manner required by law; and this cause is remanded to the Criminal Court of Hamilton County for the execution of this judgment. This case to run consecutively to sentence in case No. 118061.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be credited to the Sheriff by the Clerk of the Court below.

/s/ JOHN A. MITCHELL

/s/ WILLIAM S. RUSSELL

COURT OF CRIMINAL APPEALS DOCKET ENTRIES

DONALD L. BROOKS -vs- THE STATE	Court of Criminal Appeals Hamilton County No. 205

Hamilton County Criminal Court No. 118601—Armed Robbery
Hamilton County Criminal Court No. 118079—Carrying Pistol

May 14, 1970	—Transcript of the Record filed, 3 volumes—6 exhibits Attorneys: For Brooks—Hon. Jerry Summers For State—Hon. Tom Fox, Ass't. Attorney General
June 10, 1970	—Motion to Allow Time to file Assignments of Error
June 10, 1970	—Order allowing 60 days to file Assignments of Error
Sept. 3, 1970	—Assignments of Error and Brief filed by Jerry Summers
Sept. 17, 1970	—Reply brief by Assistant Attorney General Fox
December 8, 1970	—Submitted to Court on Briefs
May 5, 1971	—Affirmed by Court of Criminal Appeals
Aug. 20, 1971	—Motion to Stay Judgment by Summers
Aug. 20, 1971	—Stay Order
Aug. 20, 1971	—Notice intent to File Certiorari to the United States Supreme Court

SUPREME COURT OF TENNESSEE AT KNOXVILLE

[Filed Aug. 16, 1971]

JOHN A. PARKER, *Clerk*

DONALD L. BROOKS -vs- STATE OF TENNESSEE	Hamilton Criminal WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Hamilton County, opinion and Decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner, Donald L. Brooks will pay the costs incident to filing petition for certiorari, for which let execution issue.

ROSS W. DYER, J.
LARRY CRESON, J.
GEORGE F. MCCANLESS, J.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

DONALD L. BROOKS, *Appellant*, vs. STATE OF TENNESSEE, *Appellee*	No. 205 Hamilton County

NOTICE OF PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM A JUDGMENT OF THE SUPREME COURT OF STATE OF TENNESSEE

[Filed August 20, 1971]

Notice is hereby given that Donald L. Brooks, the appellant above named, appeals to the United States Supreme Court from the final Order of August 16, 1971 affirming appellant's judgment of conviction entered therein.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257.

Appellant was convicted of the crimes of Armed Robbery and Carrying a Pistol, in violation of Tennessee Code Annotated, Section 39-3901 and 39-4901, was sentenced to ten (10) years in the State Penitentiary and eleven (11) months, twenty-nine (29) days in the County Workhouse respectively and is presently confined at the State Penitentiary in Nashville, Tennessee.

/s/ JERRY H. SUMMERS

Attorney for Appellant
206 Professional Building
Chattanooga, Tennessee

SUPREME COURT CERTIORARI DOCKET ENTRIES

DONALD L. BROOKS
vs.
STATE OF TENNESSEE

Hamilton County
Court of Criminal Appeals
No. 205

June 17, 1971—Writ of Certiorari filed by Jerry H. Summers

June 17, 1971—Notice Waived

June 17, 1971—Petition filed

June 17, 1971—Assignment of Error and Brief by Jerry H. Summers

June 22, 1971—Reply Brief of State to Petition for Writ of Certiorari by Ass't. Attorney General Fox

Aug. 16, 1971—Petition for Writ of Certiorari Denied by Tennessee Supreme Court.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

DONALD L. BROOKS,
Plaintiff in Error

STATE OF TENNESSEE,
Defendant in Error

No. 205
Hamilton County

ORDER

Upon motion of the plaintiff in error, Donald L. Brooks, he is hereby granted a stay of execution of the judgment of this Court rendered on May 5, 1971, for a period of ninety days pending the filing of and disposition of a petition for the writ of certiorari to the Supreme Court of the United States, his petition for writ of certiorari to the Supreme Court of Tennessee having been denied on August 16, 1971.

The Clerk of this Court will issue a duly certified copy of this Order to the Clerk of the Criminal Court and to the Sheriff of Hamilton County.

Enter this 20th day of August, 1971.

/s/ W. WAYNE OLIVER, *Judge*

SUPREME COURT OF THE UNITED STATES

No. 71-5313

DONALD L. BROOKS, *Petitioner*,

v.

TENNESSEE

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Tennessee.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question III and IV presented by the petition which read as follows:

"III. The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth Amendment and Fourteenth Amendment of the Federal Constitution and Article I, Section 9 of Tennessee Constitution.

"IV. Code section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution."

☆ U.S. Government Printing Office: 1972—454-861/436

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-5313

DONALD L. BROOKS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Tennessee

BRIEF FOR THE RESPONDENT

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4 Jones, Evidence (5th Gard 1958), § 889 6

2 Underhill, Criminal Evidence (5th Ed. Herrick 1956), § 510 6

3 Wharton, Criminal Evidence (12th Edition Anderson 1955), § 840 6

6 Wigmore, Evidence (3rd Ed. 1940), §§1837, 1838, 1841, 1869 ..... 6, 7

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-5313

DONALD L. BROOKS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Tennessee

BRIEF FOR THE RESPONDENT

OPINION BELOW

A correct copy of the May 5, 1971, opinion and judgments of the Court of Criminal Appeals of Tennessee, affirming the conviction of the Petitioner in the First Division of the Circuit Court of Hamilton County, Tennessee, of the offenses of armed robbery and unlawfully carrying a pistol, is included in the appendix. (Appx. 6-22). A correct copy of the August 16, 1971, order of the Supreme Court of Tennessee denying Petitioner's petition for writ of certiorari is also included in the appendix. (Appx. 24).

JURISDICTION

The jurisdictional requisites are adequately set forth in the brief of the Petitioner. (Pet.Br. 1-2).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[2]

U.S. Const., amend. V.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., amend. XIV.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

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[1] References to Petitioner's brief are to pages as numbered in the carbon copy of his brief served upon Respondent December 30, 1971. As of the date the manuscript of Respondent's brief went to the printer, January 27, 1972, Respondent had not received a copy of Petitioner's printed brief.

[2] The brief of the Petitioner (Pet. Br. 2-3) incorrectly states that Amendment VI to the Constitution of the United States is involved. However, this Court's November 16, 1971, order granting the petition for writ of certiorari (Appx. 28) specifically limits the grant to petition Questions III and IV, which involve U. S. constitutional provisions only with regard to Amendments V and XIV.

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Tenn. Const., art. I, sec. 9.[3]

"That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial; by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself."

Tenn. Code Ann. [T.C.A.], sec. 40-2403.

"The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defend-

---

[3] Tennessee Constitution, Article I, Section 9, was relied upon by the Petitioner before the Court of Criminal Appeals of Tennessee, but that Court overruled his assignment of error which contended that the refusal of the trial court because of T.C.A. § 40-2403 to allow him to be placed on the witness stand after other witnesses had testified in his behalf violated Tennessee Constitution, Article I, Section 9. The same assignment of error with regard to the same Tennessee constitutional provision was made to the Supreme Court of Tennessee in a petition for writ of certiorari, but that Court held that the petition was not well taken and denied it. Although this Court's order (Appx. 28) granting the petition for writ of certiorari grants it as to Question III of the petition, which contends in part that T.C.A. § 40-2403 violates Tennessee Constitution, Article I, Section 9, Respondent contends, for reasons stated *infra* 26-27 that this Court should not be concerned with whether the State statute in question violates the State constitutional provision invoked by Petitioner, that being a matter for the State courts whereas this Court's jurisdiction is as to Federal questions.

ant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

QUESTIONS PRESENTED

The questions presented, as stated in the Court's November 16, 1971, order granting the petition for writ of certiorari (Appx. 28), are as follows:

"III. The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth Amendment and Fourteenth Amendment of the Federal Constitution and Article I, Section 9 of Tennessee Constitution."

"IV. Code section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution."

STATEMENT OF THE CASE

The Petitioner, Donald L. Brooks, was tried on April 1, 1970, in the First Division of the Circuit Court of Hamilton County, Tennessee, on two charges. In number 118061, the jury found the Petitioner guilty of armed robbery and fixed punishment at ten (10) years in the State Penitentiary. In number 118079, the jury found the Petitioner guilty of unlawfully carrying a pistol and fixed punishment at a fine of Fifty Dollars ($50.00) and a term of eleven months and twenty-nine days in the county workhouse. Thereupon the trial judge pronounced judgment.

In the course of the trial, after the State had completed its case, counsel for Petitioner moved the court for permission to reserve the right to have the Petitioner testify following certain other witnesses for the defense. The trial court denied the motion on the grouund that T.C.A.

§ 40-2403 requires that if a defendant testifies he must do so before any other testimony for the defense is heard. (Appx. 1-3).

After conviction, a motion for a new trial was filed and was overruled by the trial court. One of the grounds for the motion (ground 6) was that the court had erred in refusing to allow the Petitioner to be placed on the witness stand after other witnesses had testified in his behalf, it being contended that the statute in question is "unconstitutional", although no particular constitutional provision was invoked. (Appx. 4-5).

Petitioner appealed his convictions to the Court of Criminal Appeals of Tennessee, assigning as error inter alia that the trial court had erred in refusing to allow him to be placed on the witness stand after other witnesses had testified in his behalf, and contending that T.C.A., § 40-2403 violates the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9, of the Tennessee Constitution. That court on May 5, 1971, overruled the assignments of error and affirmed Petitioner's convictions. (Appx. 6-22).

Petitioner then petitioned the Supreme Court of Tennessee for writ of certiorari, again contending that T.C.A., § 40-2403 violates the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9, of the Tennessee Constitution. The Supreme Court of Tennessee on August 16, 1971, denied the petition for writ of certiorari. (Appx. 24).

Finally, Petitioner petitioned this Court for writ of certiorari, and this Court on November 16, 1971, granted the petition but limited the grant to the two questions stated *supra* 4 under "Questions Presented," challenging the constitutionality of T.C.A., § 40-2403 under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9, of the Tennessee Constitution. (Appx. 28).

ARGUMENT

I

T.C.A., § 40-2403 Is a Truth-in-Testimony Law—a Rational, Logical, and Legitimate Complement of the Sequestration of Witness Rule—Which the State Under Our Federal System Had the Right to Adopt and Apply as a Part of Its Trial Procedures for the Administration of Its Criminal Laws.

At the threshold, it is desirable to look at the background and context in Anglo-American jurisprudence of the rule that a defendant if he chooses to testify must testify before other testimony in his behalf is heard. (For brevity this rule will be referred to as the rule requiring the defendant to testify first.)

The rule requiring the defendant to testify first is closely related to the process of placing prospective witnesses out of the hearing of a testifying witness. The latter process, known as sequestration of witnesses and in many states simply as "the rule," is remarked upon by Professor Wigmore as to its "age and universality." 6 Wigmore, Evidence (3d ed. 1940), § 1837. The probative purpose and operation of the sequestration process is said to consist in preventing one prospective witness from "being taught" by hearing another's testimony (*Id.*, § 1838) or from "being influenced" thereby (4 Jones, Evidence [5th ed. Gard 1958] § 889), preventing "collusion" among witnesses (2 Underhill, Criminal Evidence [5th ed. Herrick 1956] § 510), and detecting "falsehood" and preventing a witness from "coloring" testimony because of having heard others (3 Wharton, Criminal Evidence [12th ed. Anderson 1955] § 840).

Obviously, for the sequestration rule to serve its purposes completely, it would be necessary to subject to it all

witnesses, including the parties, in a case; and this has been the practice in some courts. 6 Wigmore, *supra*, § 1841. Professor Wigmore suggests that the party should be exempted from the order of exclusion but be required to take the stand first of the witnesses on his side because, although he has the right to be present during the trial, "yet he has also the duty to do all that is feasible towards preventing suspicion and subserving the opponent's right to sequestration." *Ibid.* The latter approach has found favor in civil cases in at least Georgia, Kentucky, Mississippi, and New Jersey, and in some lower Federal courts. **Tift v. Jones**, 52 Ga. 538, 542 (1874); **Davis v. Atlanta Coca Cola Bottling Co.**, 119 Ga. App. 422, 167 S.E.2d 231, 232 (1969); **Davis v. Kimberlain**, 188 Ky. 147, 221 S.W. 226 (1920); **Commercial Credit Equipment Corp. v. Kilgore**, 221 So.2d 363, 367 (Miss. 1969); **Smillie v. Lerner**, 10 N.J. Misc. 484, 159 Atl. 808 (1932) ("This would seem to be wholesome. The advantage of the exclusion of witnesses is thereby obtained, and the disadvantage of the exclusion of a party in interest does not occur, since there can be no reason for the exclusion of the defendant after he has given his testimony."); **Garabrandt v. Boston Molasses Co.**, 10 P.R.Fed. 71 (1917) (Rule of Court 51); **Coombs v. Coombs**, 59 D.C.App. 30, 32 F.2d 421 (1929). See also, Ontario Rules of P. & P., Civ. 1947, No. 254; and rules of court in other Anglican jurisdictions cited in footnotes to 6 Wigmore, *supra*, § 1869.

The rule that the defendant in a criminal case must testify first has for similar reasons developed in a number of Anglo-American jurisdictions, sometimes by court rule or decision, sometimes by statute. Professor Wigmore states that "The reason for this rule is the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than to veracity, so as to meet the necessities as laid open by prior witnesses." 6 Wigmore, *supra*, § 1869.

The requirement that the defendant in a criminal case who chooses to testify must do so prior to testimony of other witnesses in his behalf has been approved in two of the United States Courts of Appeal. The Court of Appeals for the Sixth Circuit did so in **United States v. Shipp**, 359 F.2d 185, 189-190 (6th Cir. 1966), cert. den. 385 U.S. 903 (1966). The Court of Appeals for the Ninth Circuit likewise approved the rule in affirming a conviction in **Spaulding v. United States**, 279 F.2d 65, 66-67 (9th Cir. 1960), cert. den. 364 U.S. 887 (1960), wherein the Court said:

> "Appellant contends that the trial court erred in ruling that if appellant would testify in his own behalf, he would have to precede all other defense witnesses to the stand since he had invoked the procedure by which witnesses are excluded from the courtroom. The trial court's ruling seems to be a sensible approach to the problem of what to do with a party who is also a witness when the exclusion of witnesses is called for in order to prevent fabrication of testimony. See 6 Wigmore, Evidence, §§ 1841, 1869 (3d ed. 1940). In any event, appellant has failed to show how he suffered prejudice by the ruling. He didn't take the stand, and we doubt that there was any causal connection between the ruling here complained of and the refusal to testify. Indeed, the only connection we can think of would be that appellant was rendered incapable to tailoring his own testimony to fit in with what previously was said by other witnesses. In the absence of prejudice, we have, if anything, a case of harmless error."

Two American states, Kentucky and Tennessee, have adopted statutes requiring the defendant in a criminal case to testify first among his witnesses. The Kentucky statute (Ky.Rev.Stat. 421.225 [1962]) goes back to 1893 (**Robinson v. Commonwealth**, 459 S.W.2d 147, 148 [Ky.

1970]; **Anderson v. Commonwealth**, 353 S.W.2d 381, 387 [Ky. 1962]) and reads as follows:

> "(1) In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.
>
> (2) A defendant so requesting to be allowed to testify for himself shall not be allowed to testify in chief after any other witness has testified for the defense."

The Tennessee statute, T.C.A., § 40-2403, enacted as Chapter 79 of the Acts of Tennessee of 1887, is set out hereinabove *supra* 3. The requirement that the defendant in a criminal case testify first was early construed by the State Supreme Court in **Morgan v. State**, 86 Tenn. 472, 7 S.W. 456 (1888), to be mandatory and in **Clemons v. State**, 92 Tenn. 282, 21 S.W. 525 (1893), to be imperative. However, the Court later held that the parties could waive the requirement. **Martin v. State**, 157 Tenn. 383, 8 S.W.2d 479 (1928). And the Court held in **Arnold v. State**, 139 Tenn. 674, 676, 202 S.W. 935 (1917), that "We think it was not intended by the legislature that a defendant in a criminal case should be permitted to testify in his own behalf and not be permitted to rebut testimony against him which was offered by the State after he had taken and left the witness stand." In view of these later relaxations of the Court's early strict attitude toward the statute, and in view of its holding in **Hughes v. State**, 126 Tenn. 40, 90, 148 S.W. 543 (1912), that witnesses giving evidence in rebuttal do not go under the sequestration rule, it seems reasonable to expect that the Court would allow a defendant in a criminal case to testify on rebuttal even though he had not earlier testified in chief. Recently the Tennessee Supreme Court affirmed a holding that T.C.A.,

§ 40-2403 does not violate the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, refusing to hold that the statute violated the rights of the defendant in that case to fair trial, due process, and equal protection of the law. **Harvey v. State**, 468 S.W.2d 731 (Tenn. 1971).

A number of Anglican jurisdictions have by judicial decision or rule of court followed the practice of requiring the testifying defendant in a criminal to testify first. Thus, in Alberta, Canada, the Court in **Rex v. Christenson**, 2 Dom.L. Rep. 379, 386 (1923), stated:

> "In a criminal case, where it is intended that the accused is to be called as a witness on his own behalf, he ought—not necessarily, but generally as a matter of expediency—to be called as the first witness for the defense, because, otherwise, it is open to observation to the jury that the accused has coloured or adapted his evidence to fit in with the evidence of the witnesses who have preceded him, he necessarily being present and hearing their evidence."

In Australia, in **Rex v. Richards, McDonald, and Aunger** (1918), S.A.L.R. 315, the Court stated that "It is desirable that he [the defendant] be the first witness called where witnesses are ordered out of court."

Some years ago in England, L.C.J. Alverstone stated in **Rex v. Morrison**, 6 Cr.App.Rep. 159, 165, 75 J.P. 272 (1911): "In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call." In 1968, the Court of Appeal, Criminal Division (Davies, L.J., Roskill and Cusack, JJ.), converted Lord Alverstone's dictum in Morrison's case into a rule of law. **Regina v. Smith**, 52 Cr.App.Rep. 224, C.A., 132 J.P. 312, 1 W.L.R.

636, 112 Sol.Jo. 231, [1968] 2 All. E.R. 115. In the **Smith** case the defendant in appealing her conviction alleged as error the requirement of the trial tribunal that she give evidence first before calling any of her three defense witnesses. Cusack, J., delivered the judgment of the Court of Appeals, stating in part as follows:

> "The general rule and practice in criminal cases is that witnesses as to fact on each side should remain out of court until they are required to give their evidence. The reason for this is obvious. It is that if they are permitted to hear the evidence of other witnesses they may be tempted to trim their own evidence. It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before other witnesses who may be called on his behalf. There are, of course, rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the court in the special circumstances then prevailing. In the view of this court the general practice to which I have referred is the correct practice which ought to be observed."
>
> [The Court then quoted the same statements from **Rex v. Morrison** as are quoted hereinabove.]
>
> "That observation was interposed in the course of argument and was obiter, but it is an authoritative statement which this court reiterates and endorses as correctly stating the law."
>
> * * * * * * *
>
> "As this is a question which is still raised from time to time in the course of criminal proceedings, with which alone the court is dealing, it is hoped that the statement which I have read from LORD ALVER-

STONE, which is now endorsed by this court, will settle the matter and be accepted as setting out the correct procedure which ought to be followed in future cases."

A law review comment on the **Smith** decision, Moore, "Order of Witnesses in a Criminal Case," 26 Cambridge L.J. 185, 185-186 (1968), observes as to this proposition "now . . . elevated to the status of a rule of law":

> "It is, of course, usually very desirable that a prisoner should give evidence before his supporting witnesses are called. In a criminal case witnesses, other than the prisoner, are not allowed into court until they are due to give their evidence. Their testimony is given, therefore, in at least comparative ignorance of what others have said, and the opportunities for them to trim their testimony to accord with that of others is accordingly reduced. But the prisoner is present throughout and, if his witnesses give evidence before he does, he is afforded ample opportunity to trim his own evidence."

Petitioner's brief (Pet.Br. 11) quotes from **Nelson v. State**, 32 Tenn. 237, 257 (1852), the statement that "the experience of wise men in all ages" has been that the sequestration of witnesses rule is "invaluable, in many cases, for the ascertainment of truth and the detection of falsehood." In a continuing quest for truth and justice in the trial of cases, Tennessee continues to use the sequestration rule "to detect falsehood as well as to prevent any witness from coloring his, or her, testimony either purposely or through influence by talking to other witnesses and hearing them talk." **Nance v. State**, 210 Tenn. 328, 333, 358 S.W.2d 327 (1962). T.C.A. § 40-2403 in requiring the testifying defendant to take the stand before his other witnesses is a Truth-in-Testimony Law—a rational, logical, and legitimate complement of the sequestration of wit-

nesses rule, making the latter rule more effective in truth-seeking. Petitioner's brief recognizes this by conceding that "The fact that a party may not be placed under 'the rule' was probably one of the chief reasons for the requirement that a defendant testifying in his own behalf present himself for examination before other defense witnesses testify" (Pet.Br. 12), that "Requiring the defendant to testify first, if he testifies at all, ensures that he will not be tempted to alter his own testimony after hearing other evidence presented in his behalf" (Pet.Br. 12), that "the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than veracity, so as to meet the necessities as laid open by prior witnesses" is a "rational basis" for the T.C.A. § 40-2403 requirement (Pet.Br. 10), and that "The purpose of this Code section . . . to insure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony" is "perhaps . . . legitimate" (Pet.Br. 26).

To complete the ring, the Tennessee judiciary imposes as a condition to the testifying prosecutor remaining in the court room after the sequestration rule is in effect that he be the first witness examined for the State. Thus it was laid down in **Smartt v. State**, 112 Tenn. 539, 551, 80 S.W. 586 (1903):

> "The attorney for the State has the right to such assistance as the prosecutor can give him in the management of the State's case, and, upon his request, it is not error to permit the prosecutor to remain in the courtroom after the [sequestration] rule has been called for; but the court should impose as a condition that the State, if it desires to use the prosecutor as a witness, should examine him first."

The mandatory nature of this requirement is indicated by its restatement in the treatise regarded by generations

of Tennessee lawyers as the "Bible" of Tennessee practice and procedure, Caruthers, History of a Lawsuit (8th ed. Gilreath & Aderhold 1963) § 330:

> "In criminal cases the prosecutor is excepted from the [sequestration] rule, but the state must examine him as the first witness."

Therefore, it is "tit for tat." Whatever "burden" the defendant bears by having to testify first if at all for the defense, the State likewise bears in having to put the prosecutor on first if he is to remain in the courtroom under the sequestration rule. With this added factor in mind, not mentioned in Petitioner's brief, the rule of T.C.A. § 40-2403 conceded by him to have a "rational" basis and to be "perhaps . . . legitimate" of purpose is seen to be all the more rational and legitimate.

It should be clear from the authorities cited hereinabove that Tennessee has not at all done a unique thing in adopting the requirement that the testifying defendant testify first among his witnesses. However, even if Tennessee had done a unique thing in this regard, this should not argue against the validity of adopted requirement. "That the 'near-uniform judgment of the Nation' is otherwise than the judgment in some of its parts affords no basis for me to read into the Constitution something not found there." Chief Justice Burger, dissenting in **Baldwin v. New York**, 399 U.S. 66, 77 (1970).

Moreover, Tennessee as any other state in our federal system should be able to serve as a laboratory for experimentation in government, including the operation of the judiciary. It is, Mr. Justice Brandeis said, "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." **New State Ice Co. v. Liebmann**, 285 U.S. 262, 280, 311 (1932) (dissenting opinion). This attitude was

again expressed by this Court recently through Justice Blackmun in **McKeiver v. Pennsylvania**, 403 U.S. 528, 91 S.Ct. 1976, 1987 (1971), where it was said, "We are reluctant to disallow the States further to experiment and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial."

In a federal system such as ours, the states should be allowed some diversity in the procedures they adopt to operate their courts and trials in the administration of justice. This is not a situation in which procedures may suitably be duplicated in every state as if they were cookies produced by the same cookie cutter. It was in this spirit that the Court said not long ago that "Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here." **Spencer v. State of Texas**, 385 U.S. 554, 566 (1967).

In **Spencer**, the Court expressed its attitude of moving with "caution before striking down state procedures" and further stated:

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial [citation of cases]. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority."

Spencer v. State, 385 U.S. 554, 563-564, 565 (1967).

II.

Petitioner Has Failed to Sustain His Contention That the Trial Court Applied T.C.A. § 40-2403 So as to Violate His Fifth Amendment Right to Remain Silent.

Petitioner's reliance upon the Fifth Amendment presumably rests upon that amendment's prohibition that "No person . . . . shall be compelled in any criminal case to be a witness against himself," although he phrases it as a "right to remain silent under the Fifth Amendment." (Pet.Br. 24).

Counsel for Petitioner candidly concedes, as any honest person must, with regard to T.C.A. § 40-2403, "Nor does it deny a defendant the bare right to remain silent." (Pet. Br. 24). The argument seems to be that requiring the Petitioner to choose at the beginning of his proof whether to exercise his right to remain silent is imposed "at a time when he does not yet know of the effectiveness and scope of his defense" and, therefore, serves to "chill" the exercise of this right, because he cannot make an intelligent waiver of this right before he has seen his defense "unfold before the trial court and jury." (Pet.Br. 24). This contention is repeated in other words by saying that T.C.A. § 40-2403 "cuts down on the privilege" of remaining silent by "forcing the defendant to elect whether to exercise or waive the privilege at a time when the desirability for waiving it is unknown." (Pet.Br. 25).

The answer to this argument is that the Petitioner and counsel should have made preparation for trial so as to know at the beginning of the Petitioner's proof the effectiveness and scope of his defense and the desirability for waiving the right to remain silent by taking the stand in his own behalf. The only thing "chilled" is the opportunity otherwise to "trim" or to "color" or to falsify testimony so as to conform with that which other wit-

nesses have given after they were put under oath and subjected to cross-examination. The State submits that there is nothing unconstitutional about a rule which does not deny the defendant the right to remain silent but simply requires him to testify first among his witnesses if he is to testify at all so as to promote truthfulness in his testimony in the same way that truth is promoted as to all other witnesses by the sequestration of witnesses rule. Incidentally, the Petitioner admits that the "perhaps . . . legitimate" purpose of T.C.A. § 40-2403 "to insure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony" is such that it "cannot be more narrowly achieved." (Pet.Br. 26).

The Petitioner, elaborating upon his contention that T.C.A., § 40-2403 "chills" his exercise of his right to remain silent, adds that (1) the defendant will be subjected to the hazards of cross-examination, including attacks upon his character, if he chooses to testify, (2) the defendant may not intelligently weigh the advantages and disadvantages of testifying until he first knows whether testifying would help his cause, and (3) the choice of whether to testify is a choice which must be left to the unfettered freedom of the defendant. (Pet.Br. 29-30). As to the first of these points, it is undeniable that if the defendant chooses to testify he will be subjected to the hazards of cross-examination, including questions relating to his character. However, he would be subjected to those hazards at whatever stage of the trial he might testify. It should be noted that "It was stipulated the defendant had no prior convictions." (Appx. 9). By choosing at the beginning of his proof not to testify, the Petitioner in this case, therefore, was not avoiding a hazard that his character would be impeached by a cross-examination concerning possible prior convictions. As to the second point (that the defendant may not intelligently weigh the advan-

tages and disadvantages of testifying until he first knows whether testifying would help his cause), the Respondent rests upon its argument made hereinabove (*supra* 17) that adequate preparation for trial will result in knowledge as to whether the testimony of the defendant would help his cause. Concerning the third point (that the choice of whether to testify is a choice which must be left to the "unfettered freedom" of the defendant), the defendant has "unfettered freedom" to make that choice under the T.C.A., § 40-2403 requirement unless one means by "unfettered freedom" that the choice be free from any difficulty. There is no way of getting around the fact that the decision by a defendant to testify or not to testify may be a difficult decision for him to make whatever the stage of the trial may be at which he makes the decision. Here the Court's recent decision in **McGautha v. California**, 402 U.S. 183, 91 S.Ct. 1454, 1470 (1971), is in point. In that case the Court held that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt. In doing so, the Court said:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. **McMann v. Richardson**, 397 U.S. 759, 769 (1970). Although a defendant may have a right, even of constitutional dimensions, to follow whatever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

In **McGautha**, the Court pointed to a number of situations in which the defendant is faced with a difficult choice, none of which had been held to violate the privilege against compelled self-incrimination. These include the choice to testify in the defendant's own behalf although it may

open the door to otherwise inadmissible evidence which is damaging to his case; taking the stand in his own behalf although he may then be cross-examined on matters reasonably related to the subject matter of his direct examination; taking the stand in his own behalf although he may then be impeached by proof of prior convictions or the like; after a motion for acquittal at the close of the government's case is denied, deciding whether to stand on the motion or to put on a defense with the risk that in doing so he will bolster the government's case enough for it to support a verdict of guilty; and in Florida, under a "notice-of-alibi" rule, choosing whether to abandon his alibi defense or to give the State both an opportunity to prepare a rebuttal and leads from which to start. 91 S.Ct. 1454 at 1470-1472. The Court concluded in **McGautha**, "[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify," 91 S.Ct. 1454 at 1471, and "[T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court." 91 S.Ct. 1454 at 1474. The Respondent in the case at bar contends that likewise it is not inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify at the beginning of his proof, especially in view of the high public interest in truthful testimony which is served by the statute in question.

III

Petitioner Has Failed to Sustain His Contention That the Trial Court Applied T.C.A. § 40-2403 So as to Violate His Due Process Rights Under the Fourteenth Amendment.

The contention is made by Petitioner that the requirement of T.C.A. § 40-2403 places a substantial burden on the defendant in that it "forces him to exercise his option to testify before he has the opportunity to observe the strength of his defense" and that this is such a burden as to deprive him of due process of law. (Pet.Br. 12-13). The Respondent's reply to this argument is that the defendant should know the strength of his own defense prior to hearing it at the trial, and therefore he is not prejudiced by being required under the statute to make his decision about whether to testify before he has still another opportunity, this time in court, to observe the evidence in his behalf. There are many good reasons why a defendant in a criminal proceeding should be permitted to hear the witnesses who testify against him, but there are no reasons why he must be allowed to hear in court the witnesses he has called in his defense. If he did not know what their testimony would be, it is difficult to understand why he would call them in the first place. He is not, of course, thereby deprived of his right "to be confronted with the witnesses against him," inasmuch as at the point of beginning the proof in his behalf he will already have been confronted with the State's witnesses "against him." This constitutional provision on its face has no application to the witnesses in behalf of a defendant. **State v. Bomer**, 179 Tenn. 67, 78, 162 S.W.2d 515 (1942); **Petty v. State**, 72 Tenn. 326, 328 (1880).

The Petitioner makes the further argument that his due process rights have been violated by the application of T.C.A. § 40-2403 so as allegedly to deny him of effective

assistance of counsel. (Pet.Br. 19-20). For this proposition, Petitioner cites **Ferguson v. Georgia**, 365 U.S. 570 (1961). Petitioner's reliance upon the **Ferguson** case is misplaced, however, inasmuch as that decision held only that the refusal to allow a defendant's statement to be directed by his counsel was a violation of the Due Process Clause. Obviously, that is not the situation here with the application of T.C.A. § 40-2403, because the defendant when he takes the stand in his own behalf at the beginning of his proof is directed in his testimony by the questioning of his own counsel and enjoys the "guiding hand of counsel" referred to in **Powell v. Alabama**, 287 U.S. 45 (1932). In this connection, the Petitioner argues that the decision as to whether to take the stand at the beginning of the proof "requires that the attorney delicately weigh the pros and cons of placing the defendant on the witness stand" before the defendant and his counsel can determine "the propriety of having the defendant take the stand" and this presents "undue obstacles" and shackles the "guiding hand of counsel." (Pet.Br. 33). This brings us back to the teachings of **McGautha v. California**, 402 U.S. 183, 91 S.Ct. 1454 (1971), and **McMann v. Richardson**, 397 U.S. 759, 769 (1970), and cases cited in those decisions to the effect that the criminal process is replete with situations requiring the making of difficult judgments as to which course to follow but the Constitution does not always forbid requiring the defendant to choose. These cases and situations are discussed in Respondent's brief under proposition II, and its reasoning there is adopted here.

The Petitioner makes the charge that the requirement of T.C.A., § 40-2403 that the defendant present himself as the first witness in his own behalf is "unreasonable." (Pet.Br. 23). To the contrary, this requirement is eminently reasonable as has been demonstrated in the discussion under the first proposition of Respondent's brief, which discussion is adopted but not repeated here. Further, when a

due process argument is made on a general "fairness" approach, this Court "has always moved with caution before striking down state procedures." **Spencer v. State,** 385 U.S. 554, 565 (1967). And, as the Court pointed out in the **Spencer** case, the Due Process Clause guarantee of fundamental fairness in a criminal trial does not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." 385 U.S. 554 at 563-564. See also, Justice Stewart's concurring opinion in the same case. 385 U.S. 554 at 569. Further, the Respondent contends that the reasonableness and fairness of the requirement of T.C.A., § 40-2403 is all the more evident when it is remembered that Tennessee requires that a prosecutor who wishes to remain in the courtroom when the sequestration of witnesses rule is in effect must give his testimony before any other witnesses for the State are heard. See discussion and authorities under proposition I of this brief. *Supra* 13.

IV

Whether or Not T.C.A., § 40-2403 as Applied by the Trial Court to the Petitioner in This Case Violated the Sixth Amendment Is Not Properly Before This Court: In Any Event There Was No Such Violation.

As noted at the beginning of the Respondent's brief, the order of this Court granting the petition for writ of certiorari in this case expressly limits the grant to Questions III and IV of the petition, which raised questions only with regard to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Tennessee Constitution. (Appx. 28). Inasmuch as the Court has not granted certiorari with regard to a Sixth Amendment question, no such question is properly before the Court.

Further, it should be noted that no contention that the trial court violated the Sixth Amendment to the Constitution of the United States in its application of T.C.A. § 40-2403 to the trial of Petitioner's case was ever made in his motion for a new trial to the trial court, nor was it assigned as error in Petitioner's brief to the Court of Criminal Appeals of Tennessee, nor was it assigned as error in Petitioner's petition to the Supreme Court of Tennessee for writ of certiorari. The Petitioner having failed to raise this question at any point before any of the Tennessee courts, the Respondent takes the position that this Court should not now consider this untimely and out-of-order attempt to place the trial court in error. If there had been error with regard to the Sixth Amendment, the same should have been properly brought to the attention of the trial court and in turn to the Tennessee appellate courts. See, *e.g.*, **Hormel v. Helvering**, 312 U.S. 552, 556 (1941). There has been no significant change in the law since the trial and there is no other factor which would justify this Court in now considering this point which was nowhere raised below. **Standard Industries, Inc. v. Tigrett Industries, Inc.**, 397 U.S. 586, 587-588 (1970) (dissenting opinion).

Even if it were concluded that a Sixth Amendment question is before this Court, it is not clear at all from Petitioner's brief what his contention is in this regard. The only clause in the Sixth Amendment which the Respondent can conceive of the Petitioner having reference to is the guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . .to be confronted with the witnesses against him. . . ." As pointed out previously in this brief (*supra* 20), T.C.A. § 40-2403 in no way denies a defendant his right to be in the courtroom throughout the proceedings and to confront all of the prosecution's witnesses against him. Petitioner's complaint seems to be that he has to decide at the beginning of the proof for the

defense whether he will give testimony in his own behalf and before he hears the witnesses on his side of the case. Obviously, a guarantee that a defendant has the right to be confronted with the witnesses **against** him is no guarantee of a right to confront the witnesses **for** him. See **State v. Bomer**, 179 Tenn. 67, 78, 162 S.W.2d 515 (1942); **Petty v. State**, 72 Tenn. 326, 328 (1880). Moreover, the defendant prior to trial has been able to confront every witness that will testify for him and knows what their testimony will be.

V

Petitioner Has Failed to Sustain His Contention That the Trial Court Applied T.C.A. § 40-2403 So as to Violate His Right to Testify in His Own Behalf or His Right to Be Heard Under Tennessee Constitution, Article I, Section 9; This Court Should Not Hold That the Tennessee Statute in Question Violates the Tennessee Constitution.

The Petitioner contends that Tennessee Code Annotated Section 40-2403 as applied in this case violated his rights under Tennessee Constitution, Article I, Section 9, providing in part, "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . ."

To support this proposition, the Petitioner seems at one point of his brief (Pet.Br. 19) to rely on the Tennessee decision, **Wilson v. State**, 50 Tenn. 232 (1871), but then at a later point in his brief (Pet.Br. 21) he says that the **Wilson** interpretation of Article I, Section 9, "is no longer good law." Finally, it appears that the Petitioner really is relying upon a concurring opinion by a single judge in the **Wilson** case. There (Pet.Br. 22) he says that Judge Freeman in the aforesaid concurring opinion interpreted Article I, Section 9, of the Tennessee Constitution to mean "that he [the defendant] shall have the privilege of be-

ing defended in an argument before the jury, by counsel, in addition to the common law privilege of defending himself." 50 Tenn. at 247. The Petitioner quotes further from Judge Freeman's concurring opinion where the Judge stated, "that a prisoner may be heard in his own defense in all criminal prosecutions, and may also be heard by his counsel, means simply that such counsel shall make such argument in his defense, against the prosecution, as may be warranted by the law and the facts of the case; and that, being heard by himself, means precisely the same thing, no more, no less." 50 Tenn. at 246. If this concurring opinion by Judge Freeman in the Wilson case means anything more than that Article I, Section 9, guarantees both the defendant and his counsel the right to be heard in argument before the jury, it is beyond the Respondent's comprehension. Of course, that right is in no way involved in the instant case. The trial court below denied neither the Petitioner nor his counsel the right to defend the Petitioner by an argument before the jury. For that matter, the Petitioner was not barred in any respect during the trial from making an argument at any proper time to the judge or to the jury. The only thing that T.C.A. § 40-2403 as applied by the trial judge in this case prevented the Petitioner from doing was to testify in his own behalf after other witnesses for the defense had testified. And that did not deprive the Petitioner of his right under Tennessee Constitution, Article I, Section 9, "to be heard by himself and his counsel."

In fact, Petitioner in his brief. (Pet.Br. 24) candidly concedes that "Certainly Code § 40-2403 does not deny a defendant the right to be heard. . . ." The Petitioner's contention seems to be that Tennessee Constitution, Article I, Section 9, guarantees the defendant the right to be heard in testimony at some time later in his trial after he has decided not to testify at the beginning of his proof. Pet.

Br. 21). But the language of Article I, Section 9, of the Tennessee Constitution does not say that, and Respondent insists that it does not even imply that. In sum, the defendant **can** be heard by his own testimony, and he and/or his attorney may argue for the defendant at the close of the testimony for both sides, and nothing in T.C.A. § 40-2403 prevents any of this.

The Petitioner made this argument for a strained construction of Tennessee Constitution, Article I, Section 9, before the Court of Criminal Appeals of Tennessee and also before the Tennessee Supreme Court, but neither the intermediate nor the highest court of the State of Tennessee would buy his argument and construction. Having been turned down by the highest courts of the State of Tennessee on his proposed construction of the Tennessee Constitution as applied to the Tennessee statute, T.C.A. § 40-2403, the Petitioner now comes before the United States Supreme Court to try to get this Honorable Court to hold the Tennessee statute in question to be in conflict with the Tennessee Constitution. This Court has long adhered to the proposition that the ultimate determination of the validity of a state statute under the state's constitution rests with the highest court of that state. See *e.g.* **Highland Farms Dairy v. Agnew**, 300 U.S. 608, 612-613 (1937); **Glenn v. Field Packing Company**, 290 U.S. 177, 178 (1933); **Lehman v. State Board of Public Accountancy**, 263 U.S. 394, 397 (1923). More recently, the Court said in **McGautha v. California**, 402 U.S. 183, 91 S.Ct. 1454, 1474 (1971), that "the Federal Constitution . . . marks the limits of our authority in these cases," *i.e.*, cases challenging the trial procedures of the states.

CONCLUSION

For the foregoing reasons, Respondent, State of Tennessee, respectfully submits that T.C.A., § 40-2403 as applied in the trial of Petitioner's case below did not violate any rights of the Petitioner under the constitutional provisions which are properly before the Court under the Court's grant of certiorari limited to Questions III and IV presented by his petition and, that, therefore, the judgment of the Tennessee courts should be affirmed.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5313

DONALD L. BROOKS,
Petitioner,

v.

TENNESSEE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5313

DONALD L. BROOKS,

Petitioner,

v.

TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

BRIEF FOR PETITIONER

OPINION BELOW

A copy of the opinion of the Court of Criminal Appeals of Tennessee is appended (Appendix p. 6a).

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on August 16, 1971. The petition for a writ of certiorari was filed on August 25, 1971 and granted on November 16, 1971. The jurisdiction of this Court rests upon 28 U.S.C.A. 1257 to review the final decision of the highest court of the State of Tennessee.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States:

AMENDMENT 5

Criminal actions—Provisions concerning—Due Process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Article I, Section 9 of the Tennessee Constitution.

Right of the accused in criminal prosecutions.—That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

QUESTIONS PRESENTED

I. The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth Amendment, Sixth Amendment and Fourteenth Amendments of the Federal Constitution and Article I, Section 9 of the Tennessee Constitution.

II. Code section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE FACTS

The petitioner, Donald L. Brooks, was convicted of Armed Robbery in case number 118061 and the jury fixed petitioner's punishment at ten (10) years in the State Penitentiary on April 1, 1970. The petitioner was also found guilty by the jury of Unlawfully Carrying a Pistol in case number 118079 and the trial court fixed defendant's punishment at eleven months and twenty-nine days in the workhouse and a fine of Fifty Dollars ($50.00) and costs and ordered this sentence to be consecutive to the sentence in case number 118061. A motion for new trial was filed and overruled. The petitioner prayed an appeal and was allowed ninety (90) days within which to prepare his bill of exceptions. The petitioner was charged with the offenses of Armed Robbery and Unlawfully Carrying a Pistol on the date of October 30, 1969.

Petitioner subsequently filed appeals to the Court of Criminal Appeals of Tennessee and Supreme Court of Tennessee which were overruled and he filed a Writ of Certiorari to the United States Supreme Court which was granted on November 16, 1971. Petitioner raised several questions on which the Court has not granted certiorari.

The petitioner in the trial court attempted to question the Constitutionality of Tennessee Code Annotated 40-2403 (R. 89-92) (Appendix p. 1a).

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT WAS IN ERROR IN REFUSING TO ALLOW DEFENDANT TO BE PLACED ON THE WITNESS STAND AFTER OTHER WITNESSES HAD TESTIFIED IN HIS BEHALF AS SAID TENNESSEE STATUTE REQUIRING DEFENDANT TO BE FIRST WITNESS IS UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH AMENDMENT, SIXTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 9 OF THE TENNESSEE CONSTITUTION.

In 1887, the Tennessee General Assembly enacted a statute entitled "An act to permit parties defendant in criminal causes to testify in their own behalf. This statute now appears in *Tennessee Code Annotated*, as follows:

> *§ 40-2402.* Competency of defendant.—In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein.
>
> *§ 40-2403.* Failure of defendant to testify Order of testimony. The failure of the party to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case.

Peck v. State, 86 Tenn. 259, 6 S.W. 389 (1888) was the first case which considered the above quoted enactment. In speaking in terms of the Act's effect on a defendant, the Supreme Court stated:

> The Act undertakes to distinguish him from other witnesses in only three particulars: (1) He is not to be called except upon his own request; (2) His failure to take the stand is not to create any presumption against him; (3) He must be the first to testify for the defense when he proposes to become a witness. The first two are privileges not enjoyed by other parties; the last is a burden.

In the instant case, it is the latter portion of § 40-2403 which states that a defendant who chooses to testify in his own behalf must be the first defense witness presented, that creates the problem under consideration. It is contended on the behalf of the present petitioner that this portion of § 40-2403 creates such a serious restriction on a defendant's presentation of his defense that it is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Fifth Amendment, Sixth Amendment and Tennessee Constitution, Art. 1, Section 9.

An examination of the cases which have construed § 40-2403 is proper at this point. Although there is some question as to the certainty of the points, it appears that the requirement that the defendant be the first defense witness is mandatory. *Rayland v. State,* 86 Tenn. 472, 7 S.W. 456 (1888), by dicta, stated:

> The provision that the defendant shall offer himself before any of his proof is taken is mandatory, and, unless pursued, the defendant will not be permitted to testify . . .

Clemons v. State, 92 Tenn. 282, 21 S.W. 525 (1893) held squarely that it is mandatory that the defendant be the first defense witness, if he is to testify at all. In *Clemons,* at the close of the State's evidence, the defendant's counsel placed two witnesses on the witness stand, and then offered the defendant. Counsel asserted that it was "oversight" that the defendant did not testify first, and that the defendant would not testify as to matters upon which the first two defense witnesses were examined. In holding that the defendant could not testify, the Court stated:

> The provision is that the defendant may be the first witness in his own behalf, but not the second, third, or fourth. He may testify at one particular stage of the case, but at none other, under any circumstances.

Martin v. State, 157 Tenn. 383, 8 S.W.2d 479 (1928) held that under some circumstances the requirement that the defendant testify prior to other defense witnesses could be

waived. Although on its face contrary to Rayland and Clemons, the holding is a sound one. In Martin, after the defense had placed several witnesses on the stand, the defendant was called to testify. The State did not object, but for some undisclosed reason the defendant did not actually become a witness. After the State had rebuttal, the defendant was then placed upon the witness stand and was subjected to cross-examination. The defendant was convicted of the offense of driving an automobile while under the influence of alcohol. Defendant appealed, assigning as error the fact that he was allowed to take the stand as a witness other than the first defense witness. The Supreme Court held that the error was invited by the defendant's own conduct, and that the requirements of the statute could be waived.

It is clear that under §40-2403 the defendant will be entitled to testify on rebuttal. *Arnold v. State,* 139 Tenn. 674 202 S.W. 935 (1918), the Court stated:

> We think it was not intended by the Legislature that a defendant in a criminal case should be permitted to testify in his own behalf and not be permitted to rebut testimony against him which was offered by the State after he had taken and left the witness stand.

It has not been decided whether a defendant may testify in rebuttal if he did not testify on direct. In Arnold, this problem was not presented. The inference from *Martin v. State,* supra, however, is that unless the defendant testified on direct he would not be allowed to testify on rebuttal.

The reason for requiring the defendant to testify before defense witnesses is stated in 6 Wigmore, Evidence, 3rd Ed. §1869 (194__):

> The reason for this rule is the occasional readiness of the interested person to adapt his testimony when offered later to victory rather than veracity, as to meet the necessities as laid open by prior witnesses . . . .

Seemingly, this is the only rational basis for such a requirement. Admittedly, the requirement places a "burden" upon the defendant, *Peck v. State*, supra.

In Tennessee, it is a rule of law that witnesses may be placed in care of the sheriff or some other officer so that they cannot hear what is said by the witness being examined. As stated in *Nelson v. State*, 32 Tenn. 237, 257 (1852):

> This practice of examining the witnesses separate and apart from each other, at the request of either party, is invaluable in many cases for the ascertainment of truth and the detection of falsehood. Such has been the experience of wise men in all ages from the days of Daniel, that divinely-inspired Judge, down to the present time.

Indeed, the doctrine of sequestration is so ingrained in Tennessee Law that it is often referred to merely as "the rule". See *Nelson v. State*, supra and *Ezell v. State*, 413 S.W. 2d 678 (Tenn. 1967).

Of course, "the rule" of sequestration does not apply to parties to a suit whether civil or criminal. Tennessee Code Annotated, Section 24-106 (1871) provided:

> Nothing in any section of this chapter shall be construed to require the parties or either of them to be put under the rule, when witnesses in any cause in which the rule has been applied for and granted.

Also, the Tennessee Supreme Court stated in *Ezell v. State* that:

> The right of a criminal defendant to present witnesses in his own behalf, is a basic constitutional safeguard; consequently, any rule which abridges this right must be examined with scrutiny. By virtue of their constitutional rights persons accused of crimes are entitled to be present at every stage of the trial and are therefore exempt from the rule of exclusion of witnesses. (Emphasis supplied.) 413 S.W.2d at 680-681.

Thus, the Supreme Court expressed the view that there are constitutional reasons why a party could not be sequestered as an ordinary witness.

The fact that a party may not be placed under "the rule" was probably one of the chief reasons for the requirement that a defendant testifying in his own behalf present himself for examination before other defense witnesses testify. It should be noted that Tennessee Code Annotated § 24-106 was enacted sixteen years prior to § 40-2403, which regulates the order of the defendant's testimony. Requiring the defendant to testify first, if he testifies at all, ensures that he will not be tempted to alter his own testimony after hearing other evidence presented in his behalf. The requirement places a substantial burden on the defendant, however, in that it forces him to exercise his option to testify before he has the opportunity to observe the strength of his defense. It is contended in the instant case that this places such burden on the defendant as to deprive him of due process of law. Further it is contended that this requirement abridges a defendant's right to remain silent, and also violates Tennessee Constitution, Article 1, Section 9.

It appears that only one other statute similar to §40-2403 exists. A Kentucky statute provides as follows:

> (1) In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.
>
> (2) A defendant so requesting to be allowed to testify for himself shall not be allowed to testify in chief after any other witness has testified for the defense. Ky. Rev. Stat Ann. §421-225 (1962).

There appear to be no reported Kentucky cases which have dealt with this section.

Several cases from other jurisdictions deal with the problem of whether a defendant should be required to take the witness stand as the first defense witness. None of these cases deal

with a statute similar to the Tennessee and Kentucky statutes; none is based upon constitutional considerations.

United States v. Shipp, 359 F.2d 185 (6th Cir. 1966), held that no prejudicial error was committed when the district court rules that if the defendant was going to testify he must do so before he presented any other proof in his own behalf, and that he must do so before any other witnesses testified or offered proof. In reaching this decision, the Court quoted from *United States v. Copeland*, 295 F.2d 635 (4th Cir. 1961), cert. denied 368 U.S. 955 (1962). The quoted portion of the Copeland opinion is as follows:

> There can be no question but that the order of the reception of evidence lies within the discretion of the Trial Judge, whose action will not be reversed on appeal unless it amounts to a gross abuse of discretion. 295 F.2d at 636.

In Copeland, the defendant had been convicted of violating Internal Revenue Laws relating to distilled spirits, and he appealed. One of the defendant's contentions was that a statement offered to prove a conspiracy was introduced as evidence prior to the introduction of independent evidence of the conspiracy.

United States v. Shipp, supra., was not decided by a unanimous court. Senior Circuit Judge McAllister entered a strong dissent to the holding. The reasoning used by Judge McAllister deserves the lengthy quote which follows:

> "The defense of a man charged with crime is often one of the most difficult professional tasks which confronts a lawyer. The witnesses to be called to sustain the defense are frequently persons whose character can be easily assailed by the prosecution. . . . If the man charged with crime takes the witness stand in his own behalf, any and every arrest and conviction, even for lesser felonies, can be brought before the jury by the prosecutor, and such evidence may have devestating and deadly effect although unrelated to the offense charged. The decision as to whether the defendant in a criminal case shall take the stand is,

> therefore, often of utmost importance and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness in his own behalf. Why, then, should a court insist that the accused must testify before any other evidence is introduced in his behalf, or be completely foreclosed from testifying thereafter? We have come a long way in protecting the rights of accused persons in courts, and their rights cannot be made to depend upon a bargain between the accused and the court that if the accused will testify first, then his other witnesses can testify; otherwise, not."

Two jurisdictions, Mississippi and Washington, D.C. have whole-heartedly followed the reasoning of Judge McAllister's dissent in *United States v. Shipp, supra.*

The time-honored case of *Bell v. State,* 66 Miss. 192 5. So. 389 (1889) appears to be the first case to determine whether a defendant must be the first defense witness. In Bell, the defendant had been convicted of assault with intent to kill. At his trial, he was told that if he desired to testify he must do so before other witnesses for the defense were examined. The Supreme Court of Mississippi in a well-reasoned opinion held such a requirement to be reversable error. The court's reasoning was as follows:

> It must often be a very serious question with the accused and his counsel whether he shall be placed on the stand as a witness and subjected to the hazard of cross-examination, and one which cannot be a question that he is not required to decide upon a full survey of all the case, as developed by the state and met by witnesses on his own behalf. He may intelligently weigh the advantages and disadvantages of his situation; and, thus advised, determine how to act, whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or discretion of the presiding trial judge. Control as to either is coercion and coercion

> is denial of freedom of action. 66 Miss. at 194, 5 So. at 389.

Roberson v. State, ___Miss.___185 So. 2d 667 (1966) dealt with the question decided in Bell. Although the decision in Roberson was upon other grounds, the principles in Bell, quoted above, were reaffirmed.

In *Nassif v. District of Columbia*, 201 A.2d 519 (D.C. 1964) the court adopted the view expounded by *Bell v. State*, *supra*. The defendant had been convicted of indecent exposure. The trial court required the defendant to elect whether he would testify as the first defense witness or not at all. Defendant chose not to testify. In ordering a new trial, the court quoted from the Bell case, and also discussed *Clemons v. State*, 92 Tenn. 282, 21 S.W. 525 (1893). The Court distinguished Clemons on the ground that a statute required the result reached.

As pointed out above, none of the cases deciding the question presented by the instant case were based upon constitutional considerations. All concerned abuse of discretion on the part of an inferior court. It is contended, however, that to require the defendant to elect to testify first, or not at all, is not only unwise but also a deprivation of due process of law, an infringement of the right to remain silent, and a violation of Tennessee Constitution, Article 1, Section 9, and Sixth Amendment.

A defendant in a criminal prosecution has a constitutional right to testify in his own behalf. This right is guaranteed by the Tennessee Constitution. Tennessee Constitution, Article 1, Section 9, provides in part:

> That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel. . . .

This provision significantly predates the requirement of Tennessee Code Annotated § 40-2403 that the accused present himself as the first defense witness, if he chooses to testify at all. It is submitted that § 40-2403 encroaches upon the constitutional right extended to the accused, and therefore, must fall.

Charles Wilson v. The State, 50 Tenn. 232 (1871) interpreted Tennessee Constitution, Article 1, Section 9. The Court said:

> We are of the opinion that the prisoner in all criminal prosecutions, after the testimony has been heard for and against him, has a right to be heard in an argument in his own behalf and as his own advocate, or in an explanation of the circumstances which have been testified against him. That it is error to deny him this right.
>
> In other words, the Constitution guarantees to every prisoner the right to explain the case made against him, in his own way.

When Article 1, Section 9 as construed by *Charles Wilson v. The State, supra,* is viewed in the light of the requirements of the Constitution of the United States, it becomes clear that Tennessee Code Annotated, § 40-2403 cannot be allowed to stand as law. In *Ferguson v. Gerogia,* 365 U.S. 570 (1961), the Court declared unconstitutional a Gerogia statute which provided that although the defendant be incompetent to testify, he could make an unsworn statement. When the accused started to commence his statement, his counsel desired to direct the giving of the statement. The United States Supreme Court found that the Georgia court's refusal to allow defendant's unsworn statement to be directed by counsel was a denial of effective assistance of counsel at a crucial point in his trial, and thus violated the due process clause of the Fourteenth Amendment.

The portion of Tennessee Code Annotated § 40-2403 objected to in the instant case, after providing that a defendant may testify in his own behalf, states:

> But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case.

Certainly, Tennessee Constitution, Article 1, Section 9, construed in light of the requirements of *Ferguson v. Georgia* as it must be affords the defendant the right to make a state-

ment after all evidence is in, and this statement may be directed by counsel. It is submitted that the giving of a statement controlled by counsel is "testimony", despite the fact that the defendant in making the statements "is not to be sworn or cross-examined as a witness". *Charles Wilson v. The State*, 50 Tenn. 232, 242 (1871). Although the *Charles Wilson* case declares such a statement to be "not testimony, in its legal sense, it is submitted that logic dictates otherwise. Thus, the requirement imposed by S40-2403, that the defendant choose between testifying first and not testifying at all, is in violation of the Tennessee Constitution, Article 1, Section 9, which guarantees the defend- the right to be heard at some time later.

Further, it is submitted that the interpretation placed upon Tennessee Constitution, Article 1, Section 9 by *Charles Wilson v. The State*, supra is no longer good law. It is clear that at the time Charles Wilson was decided, the defendant did not have the right to testify as a sworn witness in his own behalf. The Court pointed out that the Constitution provisions embodied in Article 1, Section 9, "certainly do not mean that he, the defendant may become a sworn witness in his own behalf". 50 Tenn. at 238. Sixteen years after *Charles Wilson*, in Code S40-2402, the Tennessee General Assembly provided:

> In the trial of all indictments, presentments and other criminal proceedings, the party defendant thereto may, at his request, but not otherwise be a competent witness to testify therein.

Thus, the legislature effectively overturned the *Charles Wilson* interpretation of the language of Article 1, Section 9, for that case was predicated upon the idea that the defendant was incompetent to be sworn as a witness.

What then, does the language of Article 1, Section 9, mean? It is submitted that the interpretation placed upon the language by Judge Freeman, concurring in *Charles Wilson*, must control. Judge Freeman stated Article 1, Section 9 to mean:

> That he, the defendant, shall have the privilege of being defended in an argument before the jury, by counsel, in addition to the common law privilege of defending himself. 50 Tenn. at 247.

Thus, Judge Freeman felt that the constitutional right referred to the time that evidence is being put in, not to when it is all in. Freeman also stated:

> . . . that a prisoner may be heard in his own defense and may be heard by counsel, means simply that such counsel shall make such argument in his defense, against the prosecution, as may be warranted by law and the facts of the case; and that, being heard by himself, means precisely the same thing . . . (*Emphasis* added) 50 Tenn. at 246.

It seems clear that the import of Article 1, Section 9 was to afford the defendant the right to be heard in his own behalf during the proceedings. Code §40-2402 merely clarified this right. It is submitted that Article 1, Section 9, cannot be abridged by unreasonable restrictions, and that the requirement that the defendant present himsel as the first witness in his own behalf is unreasonable. See *Bell v. State* and *Nassif v. District of Columbia,* discussed above. The defendant in the instant case respectfully prays that this Court declare that the portion of Code §40-2403 requiring the defendant to testify first be declared unconstitutional as a violation of the Tennessee Constitution, Article 1, Section 9 and the Sixth Amendment of the Federal Constitution.

Code §40-2402 expressly removes an accused's incompetency to testify. Further, it is submitted that under Article 1, Section 9, the defendant must be allowed o testify in his own behalf. Code §40-2403 provides that no presumption against the defendant arises as a consequence of his failure to testify, this section also provides that the defendant desiring to testify shall do so before any other testimony for the defense is heard. The latter portion of Code §40-2403, requiring the defendant to testify first, if at all,

abridges a defendant's right to remain silent under the Fifth Amendment of the United States Constitution.

Certainly Code § 40-2403 does not deny a defendant the right to be heard, nor does it deny a defendant the bare right to remain silent. The requirement that the defendant exercise his right to remain silent at a time when he does not yet know of the effectiveness and scope of his defense, however, serves to "chill" the exercise of this right. Before the defendant, in a criminal proceeding, has seen his defense unfold before the trial court and jury, he cannot make an intelligent waiver of his right to remain silent. Measures which serve to "chill" or penalize the exercise of constitutional rights cannot stand as law. *Griffin v. California*, 380 U.S. 609 (1965), *United States v. Jackson*, 390 U.S. 570 (1968).

In *Griffin v. California*, 380 U.S. 609 (1965) the United States Supreme Court held that the trial court's and the prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. The basis of this decision is that to comment upon the exercise of the constitutional right to remain silent imposes a penalty upon the exercise of that right. The Court stated:

> It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privileges by making its assertion costly. 380 U.S. at 614.

Although Tennessee does not allow comment upon the exercise of the right to remain silent, by forcing the defendant to elect whether to exercise or waive the privilege at a time when the desirability for waiving it is unknown, Code § 40-2403 likewise "cuts down on the privilege."

In *United States v. Robel*, 389 U.S. 258 (1967), the States Supreme Court held that a law making it illegal for a person who is a member of a Communist-action organization to accept employment in any defense facility is unconstitutional. The court pointed out that this

violated an individual's right of association, protected by the First Amendment. Thus, in *Robel.*, the court struck down a law which placed a penalty on a person's exercise of constitutional rights. *Shelton v. Tucker*, 364 U.S. 479 (1960) is in agreement. In *Shelton*, the Court stated:

> In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. 364 U.S. at 488.

In the instant case, it is admitted that the purpose of Code § 40-2403 cannot be more narrowly achieved. The purpose of this Code provision is to ensure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony. Perhaps this purpose is legitimate. The choice to be made by the defendant in electing to waive his constitutional right to remain silent, however, is of such paramount importance that a requirement such as found in Code § 40-2403 serves to "chill" the exercise of that right.

In *United States v. Jackson*, 390 U.S. 570 (1968) the Court held that the Federal kidnaping Act:

> . . . . tends to discourage defendants from insisting upon their innocence and demanding trial by jury . . . . 390 U.S. at 583.

The Court also stated:

> We agree with the District Court that the death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise of a constitutional right . . . . 390 U.S. at 572.

The language used by the Court in Jackson is significant. The Court made it clear that it would tolerate no requirements which penalize or "chill" the exercise of constitutional rights.

The Court said:

> Whatever may be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional: the question is whether that effect is unnecessary and therefore excessive. 390 U.S. at 582.

The late Justice Hugo Black in a dissenting opinion in *Williams v. Florida*, 90 S.Ct. 1893 spoke of the Fifth Amendment privilege:

> It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a "poker game" or sporting contest", for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. Defendants, they said, are entitled to notice of the charges against them, trial by jury, the right to counsel for their defense, the right to confront and cross-examine witnesses, the right to call witnesses in their own behalf, and the right not to be a witness against themselves. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts and convince the jury through its own resources. Throughout the process the defendant has a fundamental

> right to remain silent, in effect challenging the State at every point to "Prove it".
>
> A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted. Their decision constitutes the final word on the subject, absent some constitutional amendment. That decision should not be set aside as the Court does today.

The reasoning employed in *Bell v. State, supra, Nassif v. District of Columbia, supra,* and the dissent in *United States v. Shipp, supra,* are persuasive. Briefly, the main points of those opinions are: (1) that the defendant will be subjected to the hazards of cross-examination, including attacks upon his character, if he chooses to testify; (2) the defendant may not intelligently weigh the advantages and disadvantages of testifying until he first knows whether testifying would help his cause; and (3) the choice of whether to testify is a choice which must be left to the unfettered freedom of the defendant.

For the above reasons, Code § 40-2403 "chills" the defendant's exercise of his right to remain silent. Since Code § 40-2403 is at variance with the Fifth Amendment of the United States Constitution, it should be declared null and void. The defendant in the instant case prays that the court will declare § 40-2403 to be null and void.

II. CODE SECTION 40-2403 DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Tennessee Code Annotated, Section 40-2403 is unconstitutional in that it deprives a person of due process of law, guaranteed by the Fourteenth Amendment provides, in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty or property without due process of law*. . . .(Emphasis added)

It is submitted that Code § 40-2403, in requiring the defendant to testify as the first witness in his own behalf, if he chooses to testify, denies the defendant effective assistance of counsel, thus depriving the defendant of due process of law.

In *Ferguson v. Gerogia*, 365 U.S. 570 (1961), the Court declared that refusal to allow the defendant's counsel to ask the defendant questions while the defendant made an unsworn statement was a violation of due process of law. The basis of the Court's decision is that the Georgia practice denied the defendant of effective assistance of counsel.

In *Ferguson v. Georgia*, 365 U.S. 570 (1961) the Court declared that refusal to allow the defendant's counsel to ask the defendant questions while the defendant made an unsworn statement was a violation of due process of law. The basis of the Court's decision is that the Georgia practice denied the defendant of effective assistance of counsel.

> Perhaps any adverse consequences resulting from these anomalous characteristics might be in some measure overcome if the defendant could be assured of the opportunity to try to exculpate himself by an explanation delivered in an organized, complete

coherent way. *But the Georgia practice puts obstacles in his way.* (Emphasis added) 365 U.S. at 591.

In *Powell v. Alabama*, 287 U.S. 45 (1932) the Court stated that in criminal prosecutions for capital offenses the defendant must be given "the guiding hand of counsel at every step in the proceedings against him." In Powell, the defendants had been altogether denied assistance of counsel. In Ferguson, the defendant did have the assistance of counsel. The presence of counsel did not prevent the Court from finding, however, that the Georgia law denied the defendant effective assistance of counsel. Denial of effective assistance of counsel than the requirement that it be decided whether the defendant testifies as the first defense witness or not at all.

The landmark decision of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 held that the Sixth Amendment to the Federal Constitution providing that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense is made obligatory on the States by the Fourteenth Amendment, and an indigent defendant in criminal prosecution in state court has right to have counsel appointed for him.

It is a serious matter of decision as to whether a defendant in a criminal proceeding shall waive his constitutional right to remain silent, and take the stand in his own behalf. This decision requires that the attorney delicately weigh the pros and cons of placing the defendant on the witness stand. To require that the decision be made before the defendant and his counsel can determine the propriety of having the defendant take the stand certainly presents undue obstacles and shakles the "guiding hand of counsel." Thus, under the view of *Ferguson v. Georgia, supra*, Code § 40-2403 violates the Due Process Clause of the Fourteenth Amendment. The defendant in the instant case respectfully prays that this Court so hold.

SUMMARY OF ARGUMENT

The decision below in preventing petitioner from testifying after other witnesses had testified for the defense under the provisions of Tennessee Code Annotated § 40-2403 violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Tennessee Constitution.

It is the contention of the petitioner that the statute in question prevents him from testifying in his own behalf after he has made the initial decision not to testify even though his defense proof doesn't develop the way that he anticipated at the time he chose not to testify at the close of the State's proof. Under the Tennessee Statute petitioner is precluded from testifying once another witness has testified for the defense. Therefore, petitioner and his counsel is placed in the position of having to make a decision at the close of the State's proof which cannot be altered if he chooses not to testify no matter how the defense proof stands up under the cross-examination of the State. As stated by Justice Black in *Williams v. Florida, supra:*

> Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

Petitioner would show that only Tennessee and Kentucky have such a statute and that in the Federal Court system a defendant is allowed to testify when he chooses.

The statute in question prevents a defendant from testifying in his behalf if he chooses not to be the first witness for the defense. Such a prohibition in effect requires him to waive his right to remain silent and exercise his right to testify in his own behalf at one particular time in the proceeding after which he has no other choice. This statute is a flagrant violation of the Due Process clause of the Fourteenth Amendment.

ARGUMENT

The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution and Article I, Section 9 of the Tennessee Constitution.

Code Section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the State of Tennessee for a new trial and Tennessee Code Annotated Section 40-2403 be declared unconstitutional.

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Chattanooga, Tennessee
37402
Attorney for Petitioner

CERTIFICATE

I hereby certify that a copy of the foregoing Brief of Petitioner to the United States Supreme Court has been served by U.S. Mail, postage prepaid this 30th day of December, 1971 upon David Pack, Attorney for Respondent.

Jerry H. Summers

BROOKS *v.* TENNESSEE

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

No. 71-5313. Argued March 21-22, 1972—Decided June 7, 1972

1. Tennessee's statutory requirement that a defendant in a criminal proceeding "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case" violates the defendant's privilege against self-incrimination. A defendant may not be penalized for remaining silent at the close of the State's case by being excluded from the stand later in the trial. Pp. 607-612.
2. The Tennessee rule also infringes the defendant's constitutional rights by depriving him of the "guiding hand of counsel," in deciding not only whether the defendant will testify but, if so, at what stage. Pp. 612-613.

— Tenn. App. —, — S. W. 2d —, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, and POWELL, JJ., joined. STEWART, J., filed a statement joining in the judgment and in Part II of the Court's opinion, *post*, p. 613. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 613. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 617.

Jerry H. Summers argued the cause and filed a brief for petitioner.

Robert E. Kendrick, Deputy Attorney General of Tennessee, argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the

trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40–2403 (1955), which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case." [1] Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know it to be, that if a defendant testifies he has to testify first." The defense called two witnesses, but petitioner himself did not take the stand.

Following the denial of his motion for new trial, petitioner appealed his conviction to the Tennessee Court of Criminal Appeals, which overruled his assignments of error, including his claim that § 40–2403 violated the State and Federal Constitutions. The Supreme Court of Tennessee denied review, and we granted certiorari to consider whether the requirement that a defendant testify first violates the Federal Constitution. 404 U. S. 955 (1971). We reverse.

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[1] Section 40–2403 was first enacted in 1887 as part of a Tennessee statute that provided that criminal defendants were competent to testify on their own behalf. That statute appears in the Tennessee Code Annotated as follows:

"§ 40–2402. Competency of defendant. In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, at his own request, but not otherwise, be a competent witness to testify therein.

"§ 40–2403. Failure of defendant to testify—Order of testimony. The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

I

The rule that a defendant must testify first is related to the ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case. See 6 J. Wigmore, Evidence § 1837 (3d ed. 1940). Because the criminal defendant is entitled to be present during trial, and thus cannot be sequestered, the requirement that he precede other defense witnesses was developed by court decision and statute as an alternative means of minimizing this influence as to him. According to Professor Wigmore, "[t]he reason for this rule is the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than to veracity, so as to meet the necessities as laid open by prior witnesses . . . ." *Id.*, at § 1869.

Despite this traditional justification, the validity of the requirement has been questioned in a number of jurisdictions as a limitation upon the defendant's freedom to decide whether to take the stand. Two federal courts have rejected the contention, holding that a trial court does not abuse its discretion by requiring the defendant to testify first. *United States* v. *Shipp*, 359 F. 2d 185, 189–190 (CA6 1966); *Spaulding* v. *United States*, 279 F. 2d 65, 66–67 (CA9 1960). In *Shipp*, however, the dissenting judge strongly objected to the rule, stating:

> "If the man charged with crime takes the witness stand in his own behalf, any and every arrest and conviction, even for lesser felonies, can be brought before the jury by the prosecutor, and such evidence may have devastating and deadly effect, although unrelated to the offense charged. The decision as to whether the defendant in a criminal case shall take

> the stand is, therefore, often of utmost importance, and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness in his own behalf. Why, then, should a court insist that the accused must testify before any other evidence is introduced in his behalf, or be completely foreclosed from testifying thereafter? . . . This savors of judicial whim, even though sanctioned by some authorities; and the cause of justice and a fair trial cannot be subjected to such a whimsicality of criminal procedure." 359 F. 2d, at 190–191.

Other courts have followed this line of reasoning in striking down the rule as an impermissible restriction on the defendant's freedom of choice. In the leading case of *Bell* v. *State*, 66 Miss. 192, 5 So. 389 (1889), the court held the requirement to be reversible error, saying:

> "It must often be a very serious question with the accused and his counsel whether he shall be placed upon the stand as a witness, and subjected to the hazard of cross-examination, a question that he is not required to decide until, upon a proper survey of all the case as developed by the state, and met by witnesses on his own behalf, he may intelligently weigh the advantages and disadvantages of his situation, and, thus advised, determine how to act. Whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or direction of the presiding judge. Control as to either is coercion, and coercion is denial of freedom of action." *Id.*, at 194, 5 So., at 389.

In *Nassif* v. *District of Columbia*, 201 A. 2d 519 (DC Ct. App. 1964), the court adopted the language and

reasoning of *Bell* in concluding that the trial court had erred in applying the rule.

Although *Bell*, *Nassif*, and the *Shipp* dissent were not based on constitutional grounds, we are persuaded that the rule embodied in § 40–2403 is an impermissible restriction on the defendant's right against self-incrimination, "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). As these opinions demonstrate, a defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination; it "may open the door to otherwise inadmissible evidence which is damaging to his case," *McGautha* v. *California*, 402 U. S. 183, 213 (1971), including, now, the use of some confessions for impeachment purposes that would be excluded from the State's case in chief because of constitutional defects. *Harris* v. *New York*, 401 U. S. 222 (1971). Although "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify," *McGautha* v. *California*, *supra*, at 215, none would deny that the choice itself may pose serious dangers to the success of an accused's defense.

Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may fail to impress the jury as honest and reliable witnesses. In addition, a defendant is sometimes compelled to call a hostile prosecution witness as his own.[2] Unless the State pro-

[2] The instant case is an apt illustration. After the State had rested, defense counsel requested permission to call the local chief

vides for discovery depositions of prosecution witnesses, which Tennessee apparently does not,[3] the defendant is unlikely to know whether this testimony will prove entirely favorable.

Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." Section 40–2403 exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first.[4] This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the

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of police as a hostile witness, and to cross-examine him about the circumstances surrounding petitioner's lineup. Because the police chief had not testified, though he was subpoenaed by the State, the trial court denied the motion, ruling that the chief will "be your witness if you call him."

[3] Tenn. Code Ann. § 40–2428 provides:

"The accused may, by order of the court, have the depositions of witnesses taken in the manner prescribed for taking depositions in civil cases, on notice to the district attorney."

However, a recent decision by the Tennessee Court of Criminal Appeals holds that this statute does not give the defendant in a criminal case the right to take a discovery deposition. *Craig* v. *State*, — Tenn. App. —, 455 S. W. 2d 190 (1970).

[4] The failure to testify first not only precludes any later testimony by defendant concerning new matters, but may also preclude testimony offered in rebuttal to State's witnesses. *Arnold* v. *State*, 139 Tenn. 674, 202 S. W. 935 (1918), holds that a defendant may testify in rebuttal if he has testified first on direct. According to the parties, there is no Tennessee case holding that a defendant who does not testify first may later take the stand in rebuttal.

stand.[5] The rule, in other words, "cuts down on the privilege [to remain silent] by making its assertion costly." *Griffin* v. *California*, 380 U. S. 609, 614 (1965).[6]

Although the Tennessee statute does reflect a state interest in preventing testimonial influence, we do not regard that interest as sufficient to override the defendant's right to remain silent at trial.[7] This is not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before. But our adversary system reposes judgment of the credibility of all witnesses in the jury. Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take into account the

[5] That burden is not lightened by the fact that Tennessee courts also require the chief prosecuting witness to testify first for the State if he chooses to remain in the courtroom after other witnesses are sequestered. *Smartt* v. *State*, 112 Tenn. 539, 80 S. W. 586 (1904). Despite its apparent attempt at symmetry, this rule does not restrict the prosecution in the same way as the defense, for the State has a certain latitude in designating its prosecuting witness, choosing for example between the victim of the crime and the investigating officer. A more fundamental distinction, of course, is that the State, through its prosecuting witness, does not share the defendant's constitutional right not to take the stand. Thus, the choice to present the prosecuting witness first or not at all does not raise a constitutional claim secured to the State, as it does in the situation of the defendant.

[6] The dissenting opinions suggest that there can be no violation of the right against self-incrimination in this case because Brooks never took the stand. But the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right.

[7] It is not altogether clear that the State itself regards the interest as more than minimally important. It has long been the rule in Tennessee that the statute may be waived, see *Martin* v. *State*, 157 Tenn. 383, 8 S. W. 2d 479 (1928), and an offer of waiver was made by the prosecutor in this case, though not accepted by the trial court.

very real and legitimate concerns that might motivate a defendant to exercise his right of silence. And it may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not yet clear. For these reasons we hold that § 40–2403 violates an accused's constitutional right to remain silent insofar as it requires him to testify first for the defense or not at all.

II

For closely related reasons we also regard the Tennessee rule as an infringement on the defendant's right of due process as defined in *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). There the Court reviewed a Georgia statute providing that a criminal defendant, though not competent to testify under oath, could make an unsworn statement at trial. The statute did not permit defense counsel to aid the accused by eliciting his statement through questions. The Court held that this limitation deprived the accused of "'the guiding hand of counsel at every step in the proceedings against him,' *Powell* v. *Alabama*, 287 U. S. 45, 69, within the requirement of due process in that regard as imposed upon the States by the Fourteenth Amendment." *Id.*, at 572. The same may be said of § 40–2403. Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of

the "guiding hand of counsel" in the timing of this critical element of his defense. While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand.

Petitioner, then, was deprived of his constitutional rights when the trial court excluded him from the stand for failing to testify first. The State makes no claim that this was harmless error, *Chapman* v. *California*, 386 U. S. 18 (1967), and petitioner is entitled to a new trial.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART joins Part II of the opinion, and in the judgment of the Court.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

This case is an example of the Court's confusing what it does not approve with the demands of the Constitution. As a matter of choice and policy—if I were a legislator, for example—I would not vote for a statute like that the Court strikes down today. But I cannot accept the idea that the Constitution forbids the States to have such a statute.

Of course, it is more convenient for a lawyer to defer the decision to have the accused take the stand until he knows how his other witnesses fare. By the same token, it is helpful for an accused to be able to adjust his testimony to what his witnesses have had to say on the matter. No one has seriously challenged the absolute discretion of a trial judge to exclude witnesses, other than the accused, from the courtroom until they are called to the

stand. The obvious purpose is to get honest testimony and minimize the prospect that a witness will adjust and "tailor" his version to fit what others have said; it seems somewhat odd to say the Constitution forbids all States to require the accused to give his version before his other witnesses speak, since it is not possible to exclude him from the courtroom, as is the common rule for witnesses who are not parties.

The Court's holding under the Fifth Amendment is admittedly unsupported by any authority and cannot withstand analysis. The Constitution provides only that no person shall "be compelled in any criminal case to be a witness against himself." It is undisputed that petitioner was not in fact compelled to be a witness against himself, as he did not take the stand. Nor was the jury authorized or encouraged to draw perhaps unwarranted inferences from his silence, as in *Griffin* v. *California*, 380 U. S. 609 (1965). Petitioner was clearly not subjected to the obvious compulsion of being held in contempt for his silence, as in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), nor did the Tennessee procedure subject him to any other significant compulsion to testify other than the compulsion faced by every defendant who chooses not to take the stand—the knowledge that in the absence of his testimony the force of the State's evidence may lead the jury to convict. Cases such as *Spevack* v. *Klein*, 385 U. S. 511 (1967), and *Gardner* v. *Broderick*, 392 U. S. 273 (1968), involving loss of employment or disbarment are therefore clearly inapposite. That should end the matter.

However, the Court distorts both the context and content of *Malloy* v. *Hogan*, *supra*, at 8, by intimating that the Fifth Amendment may be violated if the defendant is forced to make a difficult choice as to whether to take the stand at some point in time prior to the con-

clusion of a criminal trial. But, as the Court pointed out only last Term in *McGautha* v. *California*, 402 U. S. 183 (1971), "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.*, at 213. Indeed, the "choice" we sustained in *McGautha* was far more difficult than that here, as the procedure there clearly exerted considerable force to compel the defendant to waive the privilege and take the stand in order to avoid the possible imposition of the death penalty. See also *Williams* v. *Florida*, 399 U. S. 78 (1970). There is no such pressure here. The majority's rationale would lead to the absurd result that the State could not even require the defendant to finally decide whether he wishes to take the stand prior to the time the jury retires for deliberations, for, even at that point, he "may not know . . . whether his own testimony will be necessary or even helpful to his cause." Even then, he might "prefer to remain silent . . . putting off his testimony until its value can be realistically assessed." In short, even at the close of the defense case, his decision to take the stand is not unfettered by the difficulty to make the hard choice to waive the privilege. Perhaps the defendant's decision will be easier at the close of all the evidence. Perhaps not. The only "burden" cast on the defendant's choice to take the stand by the Tennessee procedure is the burden to make the choice at a given point in time. That the choice might in some cases be easier if made later is hardly a matter of constitutional dimension.

The Court's holding that the Tennessee rule deprives the defendant of the "guiding hand of counsel" at every stage of the proceedings fares no better, as MR. JUSTICE REHNQUIST clearly demonstrates. It amounts to nothing more than the assertion that counsel may not be

restricted by ordinary rules of evidence and procedure in presenting an accused's defense if it might be more advantageous to present it in some other way. A rule forbidding defense counsel to ask leading questions of the defendant when he takes the stand may restrict defense counsel in his options and may in many cases bear only remote relationship to the goal of truthful testimony. Yet no one would seriously contend that such a universal rule of procedure is prohibited by the Constitution. The rule that the defendant waives the Fifth Amendment privilege as to any and all relevant matters when he decides to take the stand certainly inhibits the choices and options of counsel, yet this Court has never questioned such a rule and reaffirmed its validity only last Term. See *McGautha* v. *California*, 402 U. S., at 215. Countless other rules of evidence and procedure of every State may interfere with the "guiding hand of counsel." The Court does not explain why the rule here differs from those other rules.

Perhaps this reflects what is the true, if unspoken, basis for the Court's decision; that is, that in the majority's view the Tennessee rule is invalid because it is followed presently by only two States in our federal system. But differences in criminal procedures among our States do not provide an occasion for judicial condemnation by this Court.

This is not a case or an issue of great importance, except as it erodes the important policy of allowing diversity of method and procedure to the States to the end that they can experiment and innovate, and retreat if they find they have taken a wrong path. Long ago, Justice Brandeis spoke of the need to let "a single courageous State" try what others have not tried or will not try. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion); see *Fay* v. *New York*, 332 U. S. 261,

296 (1947) (Jackson, J.). In the faltering condition of our machinery of justice this is a singularly inappropriate time to throttle the diversity so essential in the search for improvement.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The Court's invalidation of the Tennessee statute challenged here is based upon both its stated repugnance to the privilege against self-incrimination and its infringement of counsel's right to plan the presentation of his case.

While it is possible that this statute regulating the order of proof in criminal trials might in another case raise issues bearing on the privilege against self-incrimination, its application in this case certainly has not done so. Petitioner Brooks never took the stand, and it is therefore difficult to see how his right to remain silent was in any way infringed by the State. Whatever may be the operation of the statute in other situations, petitioner cannot assert that it infringed *his* privilege against self-incrimination—a privilege which he retained inviolate throughout the trial.

The Court's alternative holding that the Tennessee statute infringes the right of petitioner's counsel to plan the presentation of his case creates a far more dominant role for defense counsel than that indicated by the language of the Constitution. While cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), establish the fundamental nature of the constitutional right to the assistance of counsel, no case previously decided by this Court elevates defense counsel to the role of impresario with respect to decisions as to the order in which witnesses shall testify at the trial.

This Court and other courts have repeatedly held that the control of the order of proof at trial is a matter primarily entrusted to the discretion of the trial court. See, *e. g., Thiede* v. *Utah Territory,* 159 U. S. 510, 519 (1895); *Nelson* v. *United States,* 415 F. 2d 483, 487 (CA5 1969), cert. denied, 396 U. S. 1060 (1970); *Horowitz* v. *Bokron,* 337 Mass. 739, 151 N. E. 2d 480 (1958); *Small* v. *State,* 165 Neb. 381, 85 N. W. 2d 712 (1957). The notion that the Sixth Amendment allows defense counsel to overrule the trial judge as to the order in which witnesses shall be called stands on its head the traditional understanding of the defendant's right to counsel. Defense counsel sits at the side of the accused, not to take over the conduct of the trial, but to advise the accused as to various choices available to him within the limits of existing state practice and procedure.

I could understand, though I would not agree with, a holding that under these circumstances the Fourteenth Amendment conferred a right upon the defendant, counseled or not, to decide at what point during the presentation of his case to take the stand. But to cast the constitutional issue in terms of violation of the defendant's right to counsel suggests that defense counsel has an authority of constitutional dimension to determine the order of proof at trial. It is inconceivable to me that the Court would permit every preference of defense counsel as to the order in which defense witnesses were to be called to prevail over a contrary ruling of the trial judge in the exercise of his traditional discretion to control the order of proof at trial. The crucial fact here is not that *counsel* wishes to have a witness take the stand at a particular time, but that the *defendant*—whether advised by counsel or otherwise—wishes to determine at what point during the presentation of his case *he* desires to take the stand. Logically the benefit of today's ruling should be available to a defendant con-

ducting his own defense who has waived the right of counsel, but since the Court insists on putting the issue in terms of the advice of counsel, rather than in terms of defense control over the timing of defendant's appearance, the application of today's holding to that situation is by no means clear.

The Tennessee statute in question is, as the Court notes in its opinion, based upon an accommodation between the traditional policy of sequestering prospective witnesses before they testify and the right of the criminal defendant to be present during his trial. Since the defendant may not be sequestered against his will while other witnesses are testifying, the State has placed a more limited restriction on the presentation of his testimony. The defendant is required to testify, if he chooses to do so, as the first witness for the defense. The State applies the same rule evenhandedly to the prosecuting witness, if there be one; he, too, must testify first. While it is perfectly true that the prosecution is given no constitutional right to remain silent, this fact does not detract from the evident fairness of Tennessee's effort to accommodate the two conflicting policies.

The state rule responds to the fear that interested parties, if allowed to present their own testimony after other disinterested witnesses have testified, may well shape their version of events in a way inconsistent with their oath as witnesses. This fear is not groundless, nor is its importance denigrated by vague generalities such as the statement that "our adversary system reposes judgment of the credibility of all witnesses in the jury." *Ante*, at 611. Assuredly the traditional common-law charge to the jury confides to that body the determination as to the truth or falsity of the testimony of each witness. But the fact that the jury is instructed to make such a determination in reaching its verdict has never been thought to militate against

the desirability, to say nothing of the constitutionality, of additional inhibitions against perjury during the course of a trial. The traditional policy of sequestering nonparty witnesses, the requirement of an oath on the part of all witnesses, and the opportunity afforded for cross-examination of witnesses are but examples of such inhibitions. As a matter of constitutional judgment it may be said that the effectuation of this interest has been accomplished by Tennessee at too high a price, but the importance of the interest itself cannot rationally be dispelled by loose assertions about the role of the jury.

In view of the strong sanction in history and precedent for control of the order of proof by the trial court, I think that Tennessee's effort here to restrict the choice of the defendant as to when he shall testify, in the interest of minimizing the temptation to perjury, does not violate the Fourteenth Amendment. I would therefore affirm the judgment below.